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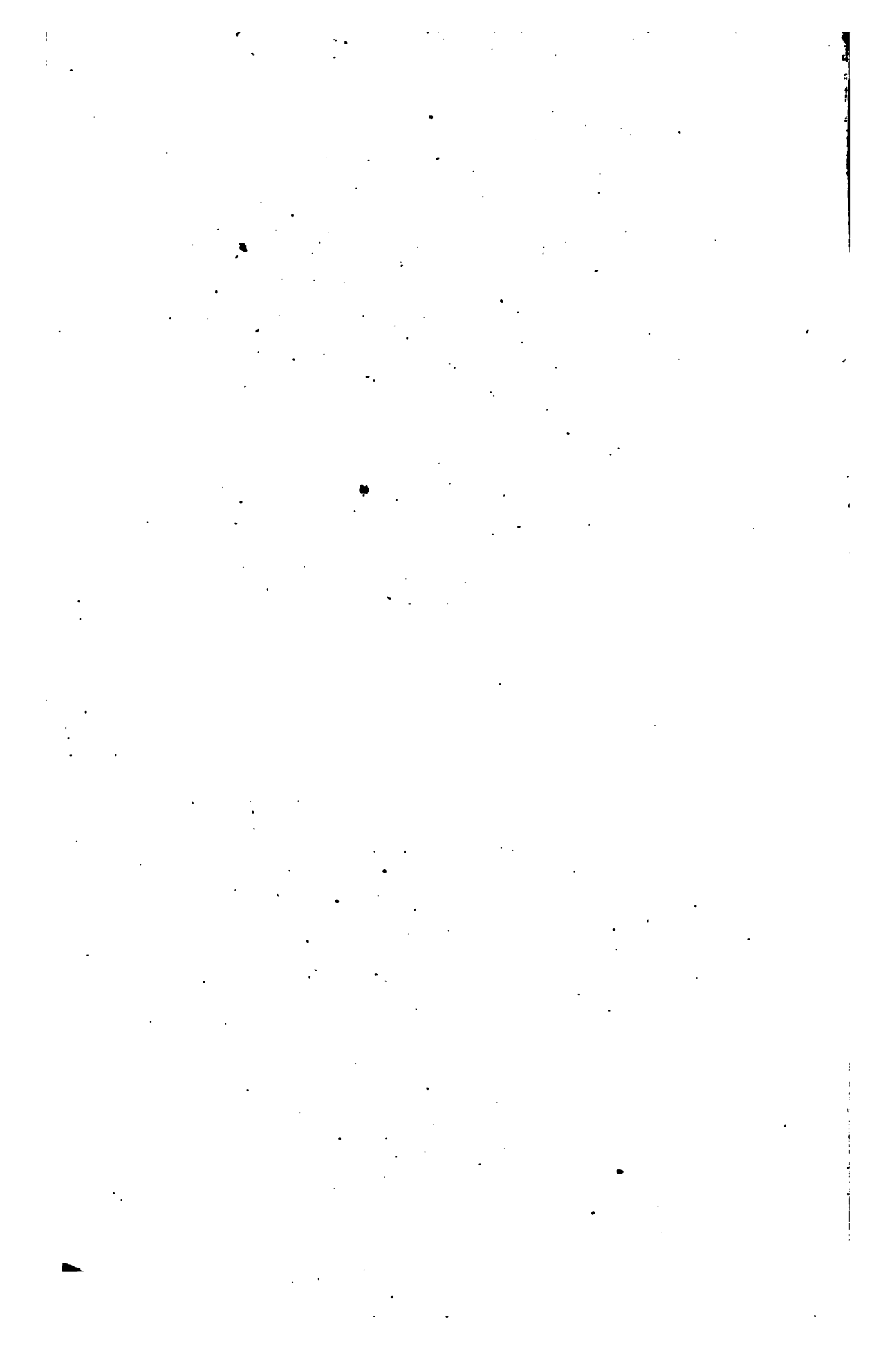
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TITLE II.

VOLUNTARY TRANSMISSION OF A PREVIOUSLY CONSTITUTED FEUDAL ESTATE.

CHAPTER I

WE are now to consider the subject of the transference of lands by the proprietor to a third party, who is usually termed a singular successor,—because he takes, not by law as heir, and as having a universal title, but by a special or separate, that is, a singular, title, founded not on the law, but on a disposition in his favour.

In the constitution of an original feudal estate, we have seen that there are only two persons concerned,—the original owner, who becomes the superior; and the new owner, who becomes the vassal. On the transmission of the estate, so constituted, from the vassal to a third party, there may appear no reason for the intervention of any parties besides the vassal and the new owner; and in an allodial system there would be no need of more than the former and the new owners; but, in effecting the complete substitution of the new for the former vassal, an act of the superior is rendered necessary by the rules of the feudal system; and there are accordingly three persons concerned in this transaction, viz., the vassal; his donee, who is the new owner; and the superior. The superior's concurrence cannot now be refused; but yet the transmission is not perfectly complete without it,—a rule incident to the feudal system of land-rights, and especially a consequence of the legal restraints formerly existing on the alienation of a feudal estate by the proprietor to a stranger.

The first of the writs employed in operating this transmission is the disposition of the lands to the new owner; and I will here take the simple case of the disposition by a vassal whose own title is completed by charter from his superior, recorded or followed by sasine; or by a person who has obtained a disposition of the lands, and has recorded the same, or has expedite and recorded sasine on it, though he has not entered

THE
DISPOSITION.

with his superior; the forms of the disposition to be granted, as applicable to these two cases, being identical.

**NARRATIVE
CLAUSE.**

The first clause is the narrative, or inductive; on which it is unnecessary to make much remark in addition to what has been said in reference to the corresponding clause in the original charter. If there have been articles of roup, or a previous minute of sale, their stipulations will be shortly narrated, and their implement acknowledged. The seller may, or may not, be described as 'heritable proprietor' of the lands disposed, at the Conveyancer's discretion; the words are not necessary. The seller will acknowledge receipt of the price, when there is any, and discharge it.

DISPOSITIVE.

We have next the dispositive clause, which runs thus:—'Have sold, 'as I hereby sell and dispoⁿe, to the said B., and his heirs or assignees 'whomsoever, All and whole (the lands), together with all right, title, 'and interest which I, or my predecessors and authors, or heirs and 'successors, had, have, or can claim or pretend thereto, now and in all 'time coming.' The leading distinction between this clause as in the disposition and in the original charter, consists in this, that, in the latter (the charter), the granter 'sells, and in feu (or blench) farm dispoⁿes;' whereas, in the former (the disposition), he simply 'sells and dispoⁿes,'—omitting the words 'in feu (or blench) farm,' which are applicable to the case of a writ creating or constituting an original fee or feudal estate, not to a writ transmitting such estate. Care must be taken to introduce in this clause the destination to heirs according to the intention of the dispoⁿee, as this is the ruling clause of the deed.

The description of the lands must also be framed with nice accuracy; but, having spoken fully as to these points in reference to the original charter, it is unnecessary to say more regarding them here. The clause, 'together with all right,' etc., is strictly appropriate to the disposition, and should not be omitted; though these words are unnecessary when lands are sold for an onerous consideration, and with absolute warrandice. In such cases, the conveyance, though not containing the clause of 'all right, title,' etc., carries with it every right, present and future, available to the dispoⁿer, or his representatives, and really comprehended in the conveyance he has granted. But though the words are not essential, at least in onerous transactions, they have been founded on as useful in a case where the dispoⁿer had in his person two separate fees or feudal estates,—the one of the property, the other of the superiority, of the lands described in the conveyance, and where the question was raised whether his disposition carried both or only one of them. In a case of gratuitous alienation, where these words did not occur, the want of them was; with some other circumstances, held by eminent counsel conclusively to fix that one particular fee only was disposed. Mr. Duff holds that the addition of these words will clearly operate to make a disposition, by one having separate fees or estates of property and superiority in the same lands, compre-

hend both fees. But when two fees are to be conveyed it is advisable always to say, 'All and whole the following lands, both property and superiority,' or to use other words of the like import, besides also using the words 'together with all right,' etc. In that way the intention of the parties will be instructed beyond the possibility of doubt.

If the lands are subject to any existing real burden, it ought to be referred to in the dispositive clause in due form.¹ If such burden is to be constituted by the disposition, it ought to be specified and expressly declared a real burden in the dispositive clause. REAL BURDENS.

At the close of the dispositive clause the term of the purchaser's entry is specified thus:—'with entry at the term of'. This blank will be supplied according to the agreement of parties. The rights of the seller and buyer, respectively, to the rents, are regulated by the term of the latter's entry, as was explained in reference to the original charter. TERM OF ENTRY.

We have next, in conveyances prior to the operation of the Titles Act of 1858, the obligation to infeft by double, or, more correctly, alternative manners of holding; the one, *of* the seller, or *de me*; the other, *from* or *in place of* the seller, *of* his superior, that is, *a me de superiore meo*. After that Act came into operation, we had, in consequence of the provisions of sect. 5, the specification of the alternative manners of holding in the above terms, without the obligation to infeft. Now, by the joint operation of the Titles Acts of 1858, sect. 5, and of 1860, sect. 36, conveyances which express no manner of holding are held to contain the alternative holding, when the investiture contains no prohibition against subinfeudation or an alternative holding; and they are held to contain a holding *a me* only, when the investiture expresses such prohibition. In these circumstances, there is now no benefit in expressing either obligation to infeft or manner of holding, in a disposition such as we are considering. OBLIGATION TO INFEST.

These clauses, whether expressed or implied, being of very special importance and distinctive in their form, require particular notice. We have seen that, under the feudal system in its original rigour, no vassal could compel his superior to accept another vassal in his stead. Notwithstanding the prevalence of these rules, however, the natural rights attendant on property could not, even at the time we refer to, be altogether restrained. The vassal indeed could not voluntarily alienate his lands so as to substitute a new vassal in his place; but, when not specially prohibited, he could grant a sub-feu or subaltern right, whereby—he himself remaining vassal to his own superior, and liable as such to all the services and duties incumbent on the vassal—there was yet operated, substantially, a transfer of the lands, by the constitution of a new feudal estate, to be holden *of* him. As his feudal estate was constituted and complete by the grant from his own superior, and sasine thereon, so the sub-feu was constituted and complete by a charter from him to his

¹ 10 & 11 Vict. c. 48, s. 5.

ENGLISH STA-
TUTE, '*Quia
emptores.*'

sub-vassal, and sasine thereon, without the necessity of the consent or confirmation of any third party. And in this way the commerce in land, though prohibited in the form most direct and complete, was to some extent carried on. This mode of proceeding was so largely adopted in England as to call for the interference of Parliament in the time of Edward I. In the eighteenth year of that monarch's reign the famous Statute,¹ known as the '*Quia emptores terrarum*,' from the words with which it commences, was passed. By that Statute, on the narrative of the practice of selling lands to be holden of the feoffors (sellers) and not of the chief lords (superiors), whereby the same chief lords lost their escheats, marriages, and wardships, it is declared lawful to every freeman to sell at his own pleasure his lands and tenements, or part of them, to be holden of the chief lord by such service and customs as the seller held before. There is here no express prohibition to subfeu, or to sell to be holden of the seller, only a power to sell to be holden of the superior; but, in practice, the Statute operated to stop sub-feus in England. Alienation, to be holden of the seller's superior, has been absolutely free in that country since the year 1290, when the above Act came into operation; and subinfeudation has long at least been unknown,—a state of things which has led, or contributed to lead, to the system of leasehold rights, which, though convenient for various minor purposes, especially as now privileged by the Leases Act of 1857, appears to be inferior to the feu as a general system of land-rights. In Scotland it is maintained by some authorities that a Statute was passed by Robert I. to the same effect as the '*Quia emptores terrarum*.' And we have in the *Regiam Majestatem*² a Statute described as 24 Robert I. (1325), which is nearly a translation of Edward's Act. But the authenticity of the alleged Scotch Act is generally questioned; and, whether it was ever passed or not, it is certain that in this country no such law ever came into practical operation. On the contrary, we have the Act of David II. cap. 34, passed in the succeeding reign, and declaring that recognition or forfeiture of the whole feu should take place, if any Crown vassals should alienate their lands, or the most part, '*absque ipsius Regis speciali licentiâ*,' and an Act of Robert III., 1400, cap. 19, sect. 4, to the same effect. We find, moreover, subinfeudation expressly authorized and recommended by Statute, viz., the Act 1457, cap. 71, entitled, 'The King, Lords, Prelates, Baronnes, and Freeholders may set their lands in few-ferme,' which declares it 'speidful anent fewferme,' that 'the King beginne and give example to the lave;' and there can be no doubt that such a mode of transferring lands was largely adopted at the period in question. We have then the Act 1469, cap. 36, in favour of apprisers, which is known to have been taken advantage of extensively by ordinary purchasers. We know, likewise, that from an early period, though plainly not always, the Crown refused no vassal, and that subject-superiors, especially after the passing of the Act in favour of apprisers, were

EARLY SCOTCH
STATUTES.

ACT IN FAVOUR
OF APPRISERS.

¹ Stat. i. p. 255.

² *Regiam Majestatem*, p. 364. 5th edit. 1774.

often found willing to waive their right to refuse singular successors, in consideration of receiving the fine or composition fixed by that Act in the case of appraisers.

Having regard to the above state of the law and practice, the alternative holding apparently came to be employed, on the transfer of lands in Scotland, from the following considerations :—(1.) The grand object of every purchaser was security of title, which could not be obtained by means of a conveyance to be holden only *a me de superiore meo*. Such conveyance did not place within the disponent's power absolutely the means of divesting the disponent. Until the disponent was adopted and entered as vassal by the disponent's superior, the disponent, notwithstanding his conveyance to be holden *a me*, remained vassal and feudal proprietor. So entirely was this the case, that a second disponent from him, obtaining confirmation and entry from his superior, was preferable to the first disponent with an *a me* holding only, and not adopted or entered by the superior. The first disponent was likewise liable to be excluded by creditors or others claiming through the seller in virtue of subaltern rights. But by subinfeudation, or the creation of a new fee or feudal estate holden *de me*, that is, of the seller himself, the insecurity attending the holding *a me* only was removed. The conveyance to be holden of the seller himself, that is *de me*, was constituted and feudally complete without the intervention of the seller's superior. It created a new fee or feudal estate, holden of the disponent, and requiring no confirmation from his superior to give the disponent a preferable right in competition with subsequent disponents, whether purchasers or creditors. The conveyance to be holden *de me* thus gave immediate security of title.

REASONS FOR
ADOPTION OF
ALTERNATIVE
HOLDING.

But (2.) although security of title was the prime essential, it was not desired by the parties to create, in perpetuity, a new and subaltern fee. They had in view the entire substitution of the new owner for the former owner. The conveyance to be holden *de me* was resorted to as a measure of necessity; but it was not intended that a permanent right, holden of the disponent, should be created. It was the object of the parties that the new owner should take the place of the former owner, as soon as the superior should be willing to adopt and enter him as the vassal; but the conveyance to be holden *de me* was not available for such adoption and entry. It did not admit of confirmation by the disponent's superior, to the effect of making the lands in the conveyance holden of him. For bringing the new owner into the place of the former owner, it was necessary that there should be a conveyance, to be holden from or instead of the former owner, of and under his superior, that is, *a me de superiore meo*. There was thus wanted a plan giving to the purchaser immediate security as against all subsequent rights derived through the seller, and, along therewith, the right of obtaining an entry from the seller's superior, so as completely to take the place of the seller.

For effecting these two objects, the older practice was for the seller to grant to the purchaser two separate dispositions or charters; the one

OLDER
PRACTICE.

called the *de me* charter, disposing the lands to be holden *of* the seller, as superior; the other called the *a me* charter, to be holden *from or in the place of* the seller, *of* the seller's superior, or *a me de superiore meo*. The former, or *de me* charter, when followed by infeftment, gave the disponee at once, and immediately, a perfect and complete right as against the seller, and all subsequent disponees deriving right through him; and it required no act of consent or confirmation from the seller's superior to make it good or effectual. The latter, or *a me* charter, gave the disponee the means of obtaining an entry or charter from the seller's superior, as soon as he should be willing to grant it, and enabled the purchaser, by obtaining such charter, to take the place of the seller as the vassal in the lands. Had these two rights been both completed separately, they would have made two separate and distinct fees, or feudal estates; the one feudal estate of property being that contained in the charter *de me*, the superior in that estate being the seller; the other feudal estate of mid-superiority being that contained in the disposition or charter *a me*, the superior in that estate being the seller's superior; and these rights, when so created, would have required thereafter to be united, or 'consolidated' as it is technically called, by resignation *ad remanentiam*,—a process by which, as will by-and-bye be fully explained, a feu is given back by the vassal to the superior, to be kept by him in union with the superiority permanently. But it was not the practice to expedite separate sasines on the two charters. One instrument of sasine only was made out, the form of which was such, that it could be ascribed to either the charter *de me* or the charter *a me*. Until the new owner was adopted and entered by the seller's superior, the sasine, as proceeding on the *de me* charter, gave a secure title. When the seller's superior adopted the new owner, the sasine was dealt with as proceeding on the *a me* charter; and the charter *de me*, being no longer of use, was thrown out of the progress. By-and-bye, and certainly as early as the year 1608, as shown in Mr. Rodger's Feudal Forms,¹ the separate charters, with *a me* and *de me* holdings, were thrown together in the disposition with the alternative manner of holding, *a me de superiore meo vel de me*, almost in the very words now in use. The disposition, when so framed, combines the effect, and takes the place, of the separate charters. It disposes the lands to be holden either of the seller, that is, *de me*, or, alternatively from and in place of the seller, of his superior, that is, *a me*. The disposition, in the older form, contains a precept of sasine applicable to both alternatives indefinitely; and thus the alternative holding is imported into the purchaser's sasine when sasine follows on the disposition. In the new, or most modern form, there is no precept of sasine, simply a disposition, with or without the clause to be holden *a me vel de me*; and the registration of such disposition has the same effect as if there had been a disposition in the older form, with sasine thereon recorded. The conveyance to be holden *a me*, and sasine thereon, if any,

THE DISPOSITION WITH *a me vel de me* HOLDING.

¹ Rodger's Feudal Forms, p. 174.

are intended for confirmation or approval by the superior. Formerly, such confirmation was taken as soon as it could be got. Now it is so when the purchaser desires, or is obliged, to enter as vassal. Meantime, that is, until confirmation, the other alternative—the *de me* conveyance, and sasine thereon, if any—constitutes a complete feudal estate holden of the seller, as superior, and requiring no confirmation; and its object and effect are to give the purchaser a perfect title and immediate security. But the two holdings are not designed to constitute separately subsisting rights. The sole object and intention of the title to be holden *de me*, that is, of the seller, is to give the purchaser the immediate security of a right at once feudally complete, without confirmation from the seller's superior. But it is intended at the same time to give the purchaser a right capable of being confirmed by the seller's superior. For that reason the conveyance contains the alternative holding *a me de superiore meo*; and (supposing no mid-impediment to arise) the conveyance, when confirmed by the seller's superior, becomes, by his confirmation, at once, and as from the beginning, a title holden of such superior,—evacuating the holding of the seller, that is, the *de me* holding, which has only a temporary purpose, and vanishes when that purpose is served. On this subject you may be referred to the case of the Bishop of Aberdeen, and other cases reported in Morison's Dictionary.¹ The disposition, with alternative manner of holding, express or implied, therefore comes in place of the two separate charters, with *a me* and *de me* holdings respectively.

Having offered these explanatory observations, I now proceed to examine the clauses, which run thus:—

In the disposition prior to the operation of the Titles Act of 1858, the clause ran as follows:—‘And I oblige myself to infest the said A. and his foresaids, to be holden *a me vel de me* ;’ which words, by sect. 2 of the Transference of Lands Act of 1847, ‘imply an obligation on the dis-
 ‘poner to infest the disponent, and his heirs and successors, upon their
 ‘own expenses, by two several infestments and manners of holding, one
 ‘thereof’ (that is, the *de me* infestment) ‘to be holden of the disponent,
 ‘and his heirs and successors, in free blench, for payment of a penny
 ‘Scots, in name of blench-farm, at Whitsunday yearly, upon the ground
 ‘of the lands, if asked only, and freeing and relieving him and them of
 ‘all feu-duties, and other duties and services, exigible out of the said
 ‘lands and others, by their immediate lawful superiors thereof ;’ ‘and the
 ‘other of the said infestments’ (that is, the *a me* infestment) ‘to be
 ‘holden from the granter and his foresaids, of and under their said im-
 ‘mediate lawful superiors, in the same manner as the granter or his
 ‘predecessors or authors held, hold, or might have holden the same ; and
 ‘that either by resignation or confirmation, or both, the one without
 ‘prejudice of the other.’

After the Titles Act of 1858 came into operation, dispositions could

¹ Bishop of Aberdeen, 15th July 1680, and other cases, M. 3011, 3012.

be framed without any obligation to infeft. The disposition simply contains the manner of holding.—‘To be holden *a me vel de me* ;’ which clause is, by sect. 5, declared to imply that the lands are to be holden in the manner expressed in the Transference of Lands Act, sect. 2, with reference to obligations to infeft *a me vel de me*. Since the Titles Act of 1860 came into operation, the above clauses are implied in all cases where they can be competently granted by the disponent.

The first of the alternatives—the *de me* holding,—you will observe, is just the manner of holding usually expressed in an original charter of lands to be held in blench-farm. This is in perfect consistency with the object of the clause, as designed to give the new proprietor an interim title, holden of the seller. And, except in one contingency, the right feudally remaining with the seller is elusory in all respects. The annual blench-duty is one penny Scots, payable if asked only,—and, supposing the disponent ultimately to enter with the seller’s superior, in virtue of the other alternative (the *a me* holding), and thereby to evacuate the *de me* holding, the seller, and all deriving right through him, are excluded from all interest in the lands. But on the other hand, supposing that the seller shall subsequently grant an onerous disposition to a *bond fide* third party of the same lands, and that the second disponent shall first enter with the seller’s superior, such second disponent will have established in him a right of mid-superiority over the first disponent ;—the second disponent’s right will create a mid-impediment to the entry of the first disponent with the seller’s superior.¹ The first disponent will have a perfect and complete title to the lands, in virtue of his *de me* conveyance, followed by sasine or its equivalent ; but he will not hold of the seller’s superior as the seller held. He will hold of the seller’s second disponent, as now come in place of the seller ; and he will so hold in terms of the *de me* conveyance obtained from the seller. You will observe, further, that the *reddendo* applicable to the *de me* holding does not tax or limit the entry-money of strangers or singular successors acquiring the lands from the first disponent. Therefore, such parties would be liable to pay to the second disponent, upon their entry with him as the immediate superior of the *de me* conveyance, the composition or fine of a year’s rent of the lands, just as in the case of the singular successors of the feuar or vassal under an ordinary blench charter, intended to create a permanent sub-fee, with the entry untaxed. Except in the above case, and to the above effect, the feudal right remaining in the seller, after granting a conveyance with *a me vel de me* holding, is elusory. Such right is completely evacuated if the disponent obtains confirmation from the seller’s superior before the occurrence of any mid-impediment ; and, moreover, the seller’s heir is under no obligation, such as is incumbent on the heirs of superiors in the case of proper feus, to make up titles to the mid-superiority, so as to be able to protect the disponent from a claim of entry on the part of the seller’s

¹ Gardner, 6th Dec. 1839, 2 D. 185 ; reversed 3d March 1843, 2 Bell’s App. 129.

superior. The disponent himself is bound to enter with the seller's superior, as soon as the lands fall in non-entry.¹

There can be no holding *de me* only, unless it is expressed. The holding *de me* only is not intended for carrying on an existing estate, but for creating a new one; and the new creation requires the new holding to be expressed. The *a me* holding, again, is intended for carrying on the existing estate; and, under the law as it stood before the Titles Act of 1860 came into operation, a disposition of lands, not expressing any manner of holding, would have been regarded as a disposition to be holden *a me*; which, indeed, was expressly enacted by the Titles Act of 1858, sect. 5. But the words expressive of the *a me* holding, contained in that and several other sections of the Act of 1858, are, by interpretative words contained in the Act of 1860, sect. 36, declared to mean an *a me vel de me* holding, when the disponent can grant such holding; so that now, when it is competent to grant an *a me vel de me* holding, and no holding is expressed, a holding *a me vel de me* is implied.

The Act of 1860 contains, in the same section (36), a further provision, apparently intended to give a certain measure of security of title to the purchaser of lands, where the investiture contains a prohibition against subinfeudation or against an alternative holding. In such cases, as the law formerly stood, notwithstanding a sale of the lands for a full price actually paid, and notwithstanding that the purchaser had obtained a conveyance, and completed the same by sasine or its equivalent,—so that on the face of the record he appeared to be the owner, and the seller appeared to be divested,—nevertheless, any third party who, before the purchaser had completed his title by obtaining the superior's confirmation, should *in bonâ fide* have obtained from the seller, for onerous causes, a conveyance of the lands, or a bond and disposition in security over the same, could—by having his conveyance completed by sasine or its equivalent, and confirmation from the superior, or by registration of his bond in the Register of Sasines, at any time prior to the completion of the first purchaser's title by confirmation—establish in his person a title, or a heritable security, preferable to that of the first purchaser. Now, by the Act of 1860, sect. 36, it is provided that, in cases where the investiture contains the prohibition in question, the conveyance or notarial instrument in favour of a disponent shall, if an entry in the lands therein specified or thereby conveyed be expedite with the superior within twelve months from the date of such conveyance or instrument, have the same preference, in all respects, from the date of recording the same in the appropriate Register of Sasines, as if the same contained an *a me vel de me* holding, and the investiture did not contain any prohibition against subinfeudation, or an alternative holding.

By this provision, the risk of fraudulent interference with a purchaser's title to lands, held under such prohibition, is greatly diminished

¹ Dundas, 10th Feb. 1769, M. 15,035.

in the case of securities fraudulently granted by the seller to *bond fide* third parties over the lands sold; because the holders of heritable securities do not usually apply to the debtor's superior for confirmation of their heritable bonds. But the case of second conveyances, fraudulently granted to *bond fide* third parties, of the lands which have been sold, appears to have in it a greater source of risk or danger to the first purchaser. The protection given by the Act to the first purchaser does not arise unless he shall, within the twelve months, expedite an entry with the superior. But if the second purchaser has been beforehand with him, and has first obtained such entry, the first purchaser cannot afterwards, not even within the twelve months, expedite an entry at all. The superior cannot grant a second entry; and the application of the Act is thus in such cases excluded. Fortunately, however, such fraudulent transactions are not very common.

After the words of the clause of holding, the conveyance says that the holding *a me de superiore meo* is to be obtained either by resignation or confirmation, or both, the one without prejudice of the other. But we may defer entering on this part of the clause till we have gone over all the clauses of the disposition, and are considering the completion of titles by entry with the superior.

CLAUSE OF
RESIGNATION.

We next have the procuratory or clause of resignation, which, in the schedule (A) annexed to the Transference of Lands Act of 1847,¹ runs thus:—‘And I resign the said lands and others for new infeftment.’ By sect. 3 this short form is declared equivalent to the procuratory of resignation in the terms then in use, an example of which will be found in Duff's Feudal Conveyancing.²

The procuratory is a mandate authorizing the act of resignation, or rendering back the lands to the superior, in order to his granting new infeftment thereof to the disponent, to be holden of him as the seller held. The procuratory was in use to be granted to ‘*and each of them*,’ so that any man might act as procurator. Like other mandates, it fell at Common Law, in case of the death of either granter or grantee before it was executed. But by the Act 1693, cap. 35, procuratories of resignation were declared to continue in force in favour of the grantees, and their heirs, assignees, or successors, having right either by general service, or by disposition and assignation, or by adjudication, as well after as before the death of either or both of the granters or grantees. It was at the same time provided that, where such procuratories were made use of after the death of either party, the instrument of resignation should deduce the title of the party using the same under pain of nullity. Such instruments of resignation are technically called instruments of resignation *in favorem*; they being a step to a new title from the superior in whose hands the lands are resigned *in favour* of the last vassal's disponent; and they are so called in contradistinction to instruments of resignation *ad remanentiam*, being those employed when a fee is *permanently* re-

¹ 10 & 11 Vict. c. 48.

² Duff's Feudal Conveyancing, p. 208.

signed or given up by the vassal to his superior, to be retained by the superior in union with the superiority.

Now, instruments of resignation *in favorem*, which were long ago disused in the case of subject-superiors, are altogether abolished by the Infestments Act of 1845, sect. 9; and the deduction of titles, which the Act of 1693 required to take place in the instrument, is required in the charter of resignation in favour of the disponent or new vassal.

The next clause is the assignation to writs, which runs thus:—‘And I assign the writs, and have delivered the same according to inventory.’

ASSIGNATION
OF WRITS.

In the original charter, the assignation to writs has a qualified object; being intended to give the new owner or vassal right to the writs, so far only as necessary to support the subaltern right. The granter or superior reserves the superiority, and the right to the writs as relative to that fee or estate. And usually he does not deliver the writs, but only becomes bound to make them furthcoming to the vassal on necessary occasions. In the case of the disposition, the new owner is to be substituted in the full right and place of the old; and so the assignation to writs is without qualification. And the writs, moreover, are usually delivered up to the new owner. It may happen, however, either that the disposition contains only a portion of the disponent's lands, or that some of the writs are not in his possession, but are in the hands of other parties, under an obligation to exhibit them to him when wanted. In the former case, where the disposition contains only part of the disponent's lands, the disponent will not deliver the writs. He will only bind himself to make them furthcoming to the new owner when necessary. And, in the latter case (where he holds an obligation of exhibition of writs from other parties), he will assign to the new owner his own right to have the writs, not in his possession, made furthcoming. Another case may require to be provided for; viz., that of writs held by the disponent under an obligation already existing to make them furthcoming to a third party, and which, nevertheless, are to be delivered to the new owner. The clause, in that case, will run as in the statutory form, with the addition of a stipulation, that the new owner shall be bound to make the writs furthcoming, when required, to the third party, or generally, to all parties interested, and to relieve the disponent of his obligation to that effect. In short, it will place the new owner in the same position as that which the disponent occupied in regard to the writs.

It is questioned by Mr. Ross¹ whether ‘a disposition to the lands will carry more than the real title,’ and whether it will carry personal rights relating to the lands. I apprehend that a disposition of lands carries the proper writs of the lands, as accessories which cannot form the subjects of separate right. It seems impossible that lands can belong to A., and the writs thereof to B. But the assignation to writs ought never to be omitted; and where any collateral right is acquired along with, and which is not a natural accessory of, the lands, or (as it

WRITS CARRIED
BY A DISPO-
SITION OF LANDS.

CONVEYANCE
OF COLLATERAL
RIGHTS.

¹ Ross's Lectures, ii. 38.

is said) does not 'run with the lands,' there ought to be introduced, in the conveyance of the lands, either a special conveyance of the collateral right, or such words, besides the ordinary assignation of writs, as will show that the collateral right is included in such conveyance. We have indeed seen, in reference to the obligation of relief or warrandice against augmentations of stipend, when granted by the superior to the vassal of the lands and teinds out of which the augmentation becomes payable, that such obligation, being part of the feudal contract between the superior and vassal, does not require express assignation from the vassal to his heirs or disponees, but passes to heirs and disponees with the lands, and is renewed with every renewal of the investiture in the lands and teinds granted by the superior, whether in favour of heirs or singular successors.¹ But, when the relation of superior and vassal does not exist between the grantor and grantee of the obligation of relief or warrandice, when (as it is said) there is no 'privity' between these parties, such obligation just stands in the position of an ordinary personal obligation; and in such case, although the ordinary clause or obligation of warrandice will pass to the new owner by a conveyance of the lands with the writs, an obligation of relief or warrandice against ministers' stipend, or augmentations thereof, or other public or parish burdens, will not pass without a special assignation, or what is equivalent thereto.² In Spottiswoode's case, it was held that the right to such an obligation (not being granted by the superior to the vassal) did not pass to an heir by his obtaining precept of *clare constat* from the superior of the lands in his favour, and would not pass to an heir without service or special assignation, nor would the obligation pass to a third party without special assignation. The proper course in practice is to assign such obligations with as much care as we should assign an ordinary personal bond, whether the party liable in fulfilment is the superior or not.

INVENTORY OF WRITS.

The inventory of writs can often be annexed to the disposition, by way of schedule; and, when it is so, an additional stamp will not be required, unless the number of the words, in the disposition and inventory together, exceeds the number allowed for one stamp. If the inventory is written separately, it requires the ordinary progressive stamp of ten shillings, even though no stamp would have been necessary, had it been annexed to the disposition.

LANDS IN NON-ENTRY.

We have next the assignation of rents, which requires no further remark; then the clause relative to the payment of the feu-duty, and annual and other public and parish burdens, on which very little need be said in addition to the explanations given in connexion with the original charter. If the lands are in non-entry at the time of the sale, and the purchaser is not expressly bound to accept the seller's title as it

¹ Lennox, 14th July 1843, 5 D. 1357; Stewart, 15th Feb. 1860, 22 D. 755; affirmed 27th March 1863, 4 Macq. 499.

² Horne 23d Jan. 1841, 3 D. 435, 1 Ross's L. C. 55; reversed 21st Feb. 1842, 1 Bell's

App. 1. The same principle ruled the later cases of Sinclair, 16th Jan. 1844, 6 D. 378, 1 Ross's L. C. 70; reversed 14th Aug. 1846, 5 Bell's App. 353; and Spottiswoode, 2d March 1853, 15 D. 458.

stands, the seller can be required to enter with the superior, and pay whatever entry-money may be due. The entry-money is a legal burden, in this case actually due; and, though it is not exigible until the superior tenders a charter, the seller is not entitled, without express stipulation, to throw it upon the purchaser.¹ Mr. Duff says² that a purchaser entering at Whitsunday is liable for the cess from 25th March preceding that term, as being a burden current at the time of his entry. I doubt, however, if the rule of practice corresponds with this statement. The equitable rule is to apportion the cess, and any other burdens not payable as at the term of the purchaser's entry, rateably, according as the seller and purchaser have right to the rents of the corresponding period.

We have next the clause of warrandice, which is in the same terms, and of the same import, with the corresponding clause in the original charter. When the seller's title is good, and all incumbrances are cleared off, of even date with the payment of the price, this clause is of no importance. But, if eviction takes place, the clause of warrandice founds a personal claim against the seller for damages. But the claim on the warrandice is merely personal; and, even if the purchaser, in place of actually paying the price, has granted bond for the amount to a third party, he must pay the bond, notwithstanding the existence of burdens which may lead to eviction.³ It was held in Smith's case that the purchaser had renounced his right of retention of the price, as against the burdens. It is usual and proper to except from the warrandice feu-rights, if any, and current leases. When such leases have all the requisites of the Statute 1449, cap. 18, and are followed by possession before the purchaser is infeft, the purchaser is bound to implement all the clauses and obligations in them, which are proper to their nature as leases,—for example, an engagement that the tenant shall be indemnified at the termination of the lease for outlay in ameliorations on the farm or houses, etc.;⁴ and local usage may sometimes expose a purchaser to claims on the part of tenants, in connexion with farm buildings, or otherwise, though not expressly stipulated for by their leases.⁵ But it is inconsistent with the purpose of a lease to make it a security to the tenant for a mere loan of money from him to the landlord; and a transaction of that nature will not create any burden on a lease, in a question with a singular successor of the landlord, at least not after such singular successor is infeft.⁶ It sometimes happens that a sale takes place after a lease is granted to a tenant, but before the tenant has entered to possession. In that case, there ought to be a special declaration that the purchaser shall take the lands under burden of the lease, and shall be

¹ Gardiner, 7th March 1799, M. 15,037.

² Duff's Feudal Conveyancing, p. 95.

³ Smith, 2d July 1706, M. 14,184.

⁴ Bell's Principles, 1256; and authorities there cited; Hunter's Landlord and Tenant, ii. 225.

⁵ Bell, 14th June 1814, F. C.

⁶ Creditors of Auchinbreck, 11th Feb. 1748, M. 15,248; Elchies, Tack, No. 14; and Cranston, 4th Jan. 1757, M. 15,218; 5 Br. Sup. 830.

bound to allow effect to it, in like manner as if the tenant had been in possession before the sale.

REGISTRATION
CLAUSE.

We have next the clause of registration :—‘ And I consent to registration hereof for preservation ’ (or ‘ for preservation and execution ’),—the import of which has been fully explained in connexion with the original charter. The disposition may be registered in the Books of Council and Session, or other Judges’ books competent. There is no ground on which the registration of ordinary dispositions can be held competent only in the Books of Council and Session.

PRECEPT OF
SASINE.

We next have, in dispositions granted before the Titles Act of 1858 came into operation, the precept of sasine ; the form of which as in the disposition contains no peculiarity as distinguished from that contained in the original charter. But in the charter, the manner of holding being definite, the precept of sasine is likewise definite. In the disposition, if the manner of holding, express or implied, is *a me* only and definite, so also will be the precept ; and, on the other hand, if the manner of holding is indefinite,—*a me vel de me*,—the precept of sasine will be equally indefinite. In the form authorized by the Act of 1845, the precept is strictly a relative clause, and is therefore definite or indefinite, according to the terms of the obligation to infeft, expressed or implied in the disposition. In its older form, likewise, it was usually strictly relative. But it will be occasionally met with definite, even where it ought to have been indefinite ; and, in examining conveyances containing precepts, the precepts require careful inspection. I have seen the precept, in a disposition with an *a me vel de me* holding, commence thus :—‘ And, for completing the infeftment of the said B. by confirmation, I hereby desire and require,’ etc. That form of words made the precept definite ; because infeftment by confirmation is applicable only to the holding *a me de superiore meo*. There is no confirmation in the case of the *de me* infeftment. Again, in a disposition with an *a me vel de me* holding, I have seen the precept begin thus :—‘ And, in order ‘ that the said B. may be infeft in the said lands, to be holden *de me*, ‘ I hereby desire, etc.’ That, again, is a definite precept, and incapable of confirmation by the disposer’s superior. It is expressly and solely for infeftment to be holden of the disposer himself, and is equivalent to the precept in an original charter. The risk of similar blunders was obviated when the form of precept introduced by the Act of 1845 was made use of. The precept, however, in that as well as the older form, requires to specify, or at least give the means of perfectly ascertaining, the party to be infeft, and the lands in which sasine is to be given. Having gone into detail on these points, in connexion with the precept in the original charter, it is unnecessary to do so again. Now, since the Titles Act of 1858 came into operation, dispositions do not require to contain precept of sasine.

The disposition closes with a testing-clause in usual form, and, being executed and delivered, the disponee will complete his title either by

resignation, in which case he will obtain a charter of resignation from the superior, and record the same; or, if the charter contains precept of sasine, he can expedite and record sasine thereon; or, if the case falls under sect. 2 of the Titles Act of 1858, he can expedite and record a notarial instrument upon it; or he can proceed by confirmation, in which case he will record the disposition; or, if it contains precept, he can expedite and record sasine; or, if it falls under sect. 2 of the Titles Act, 1858, he can expedite and record notarial instrument; after which he will obtain a charter of confirmation from the superior.

MODE OF COM-
PLETING TITLE.

CHAPTER II.

BEFORE proceeding to exemplify the writings to be made use of for the purpose of completing the disponee's title, we shall consider those which usually precede the disposition, the particular terms of which will be better understood now than if they had been explained before going over the clauses of the disposition, and the mode of making the disponee's right real by registration or sasine.

PRELIMINARY
WRITINGS.

And, in the first place, you may be reminded that, as a general rule, lands cannot be transmitted, neither can any obligation to transmit lands be constituted, without writing. A verbal agreement to sell lands is not binding, even though admitted, unless there has been *rei interven-tus*, as, for example, by payment of the price, or part of it. Neither is the power to contract for a feu-right of lands within the range of the authority of an ordinary manager of a proprietor's mineral and agricultural operations, nor of the resident superintendent.¹ Whether, if there were a regularly adjusted draft, the authority to enter into the feu-right could be proved by parole evidence, was a question raised, but not decided, in Steuart's case.

The preliminary writings we are now to consider, though substantially of the same import, are very different in point of form. They consist of—(1.) The Missives of Sale, being an offer by the buyer or seller, and acceptance thereof, in separate letters or other writings; (2.) The Contract, or Minute of Sale, which is a formal deed by the buyer and seller mutually; and (3.) Articles of Roup and Sale by the seller, with minutes and enactment of roup and sale in favour of the buyer.

The writings employed in all these cases, whatever be their particular form, must be probative; and they must be binding on both parties.² Neither party is bound unless both are so.³ In Barron's case, there was an offer and an acceptance; the former was probative, the latter was

¹ Steuart, 17th July 1857, 19 D. 1071.

² Barron, 23d Jan. 1794, M. 8463.

³ Fulton, 26th Feb. 1761, M. 8446.

not; and, one of the parties having resiled, there was found to be no sale.

MISSIVES
OF SALE.

The offer and acceptance must contain the elements of a contract of sale, specifying, or containing materials for clearly ascertaining and fixing, what are the lands sold, and the price. The consequence of leaving the price an open point is strongly shown by a case where, on proof that the price of certain superiorities remained unadjusted, a formal disposition of them, which had been granted and delivered, with a charter and sasine following thereon in favour of the intending purchaser, were reduced.¹

The missives must also import a finished obligation on both sides, without any reservation or condition on the one side not assented to on the other. If any stipulation is made by one and not agreed to by the other, there is *locus pœnitentiæ*, and the intended transaction may be broken off by either party, however far it may have been adjusted as to other particulars.² The parties, however, may be bound, although the terms of the sale be not specifically fixed by the missives, provided these contain the means of ascertaining and fixing such terms. For example, it may be agreed that the amount of the price shall be fixed by referees; in which case the bargain will be completed, so far as to prevent resiling, by the nomination of the referees; and, their acceptance and the reference being here part of a real contract, the bargain and reference will not fall by the death of one of the parties before the amount of the price is fixed by the referees.³ Or there may be a condition in the missives, on purifying which the sale will hold good.⁴

Though missives of sale do not absolutely require to specify more than the subjects sold and the price, or to provide a conclusive mode of ascertaining and fixing the price, they usually do more. They are generally in the form of letters; and the offer, when made by the purchaser, is usually of the following or similar tenor:—

The purchaser to the seller,—

(Place and Date.)

SIR,

I hereby offer to purchase from you the lands of A., as contained in the printed particulars (or plan, or as the case may be), of which a copy is signed by me as relative hereto.

The price shall be £ , payable at , and bearing interest at per cent. from and after the term of next, which shall be the term of my entry as purchaser.

On payment of the price, you shall grant and deliver to me a formal and valid disposition of the lands, to be holden *a me vel de me*, with clause of absolute warrandice, under the exception of current leases, and with all other usual and necessary clauses; and along therewith you shall

¹ Stirling, 2d March 1824, 2 Sh. 765.

² Milne, 19th Feb. 1836, 14 Sh. 533; affirmed 16th March 1837, 2 Sh. & M'Lean, 494.

³ Earl of Selkirk, 17th January 1778, M. 627.

⁴ Earl of Aberdeen, 26th November 1823, 2 Sh. 527.

deliver to me a valid legal progress of titles; a search of incumbrances for forty years, showing the record to be clear of all burdens; and the leases or missives of lease to the existing tenants.

You shall relieve me of all feu-duties, casualties, and public and parish burdens due at and prior to the term of my entry, including the proportion, corresponding to the period then expired, of all burdens then current but not payable till afterwards.

The expense of the disposition, including fees of drawing and revising, and the stamp-duty, are to be paid by us equally.

This offer shall be binding on me for _____ days from and after this date.

I am, Sir, your most obedient servant,

(Signature.)

The acceptance is usually annexed to a copy of the offer; in which case it will be in the form of a letter from the seller to the purchaser as follows:—

SIR,

(Place and Date.)

I hereby accept your offer, of which a copy is prefixed.

I am, Sir, your most obedient servant,

(Signature.)

The offer and acceptance, in order to be probative, must either be holograph of the respective writers, or tested in the form and with all the solemnities applicable to ordinary deeds. The offer, when made in writing, will continue binding on the maker during the period specified in it, or, if no period be specified, then, as a general rule, until withdrawn. But the withdrawal must be complete before the offer has been accepted. Thus, where an offer, which contained no limit as to the time during which it should be binding, was accepted by a letter addressed to the offerer, and put into the post-office, the sale was held as concluded; although the offerer had, at the same time, withdrawn his offer by a letter addressed to the other party, and put into the post-office, and both letters (crossing each other) had been delivered to the parties, respectively, on the same day. The acceptance had been posted, and so was out of the power of the acceptor, and constituted a binding obligation on him before the withdrawal of the offer was delivered to him.¹

Some other points, connected with the conditions of offers, will be noticed when we are on the subject of the minute of sale. I will only here observe that, when lands are for sale by private bargain, or when a treaty of sale is under consideration, great care is necessary in communications with inquirers, lest the seller be prematurely committed to sell, or, it may be, involved in questions with more than one offerer. In a case where lands were advertised for sale, two parties wrote to say, 'What is the lowest price you will take?' The proprietor answered to

¹ Thomson, 13th Nov. 1855, 18 D. 1.

each, 'The price asked is £ ;' and the same post brought him letters from both, each saying, 'I accept your offer.' The proprietor had not intended his answer to the inquiries as to price to be an offer; in the view of sale he had intended that any offer should stipulate as to various minor particulars besides the price. But there was no doubt about the subjects; and, had not one of the intending purchasers in the case referred to withdrawn, there must have been a difficult and awkward legal question on the subject. To prevent such a consequence, any reply to a similar inquiry, which is not intended as an offer, should be guarded with expressions showing that it is not to be construed as an offer. For example, it may be said expressly, 'This is not to be understood as an offer;' or words to the same effect may be employed.

MINUTE OF
SALE.

I proceed to consider the second form of the preliminary writings, viz., the contract or minute of sale, which is, in an enlarged form, to the same effect as the missives of sale. This deed is useful where, from any cause, a disposition cannot be at once framed, and the transaction settled. And it is often resorted to where the transaction is of considerable importance; because it is explicit in regard to all the particulars of the transaction; whereas the missives of sale leave sundry details to be understood, or settled according to legal construction. And a minute may be regarded as necessary where there is any doubt respecting the right of the proprietor to sell; for example, when he holds under an entail of doubtful validity, and the efficacy of which requires to be tried by the Court before the sale can be carried into effect. When all is clear and simple, and when the settlement is to be at an early date, there is no need of a minute, which is greatly more expensive than missives. The minute of sale is a contract between the seller and buyer, and the obligations of the seller come first.

These are,—

1. On receiving payment of the stipulated price at the term specified in the counter obligation by the purchaser, to grant and deliver a valid and formal disposition of the lands to the purchaser and his heirs or assignees. If, after the price is due, and payment thereof is tendered by the purchaser, the seller refuses or delays to grant the disposition, the Court will, on a suit at the instance of the purchaser against the seller, and, on the purchaser paying the price into Court, pronounce decree of adjudication in implement against the seller; that is, the Court will grant a judicial disposition in favour of the purchaser; and, until the price is due and payment is tendered, neither is the seller bound to grant the disposition, nor would the Court pronounce decree of adjudication. The obligations of the parties are mutual, and must be performed *simul ac semel*; and, even though the seller has signed the disposition, and the purchaser is in possession of the lands, yet, if the disposition is not delivered, the seller will be preferred as a creditor over the lands for the price to the other creditors of the purchaser, on the principle that the lands are not transferred from the seller until the disposition by him is delivered to the

purchaser.¹ If the contract declares that the sale will become void in case of non-payment of the price by a day or term certain, such declaration will afford good ground for annulling the sale after such day or term has passed.² It may therefore be of advantage, in certain cases, to introduce an optional irritancy of the sale, or declaration to the above effect, applicable to such a contingency, so as to place it within the power of the seller to withdraw if he sees fit. But, in the case of undue delay in payment of the price, the Court, on the suit of the seller, will declare the sale void, although the minute makes no express provision on that subject.³ When the obligation is to dispoise betwixt and a day certain, the day named is apparently included; so that a disposition tendered to the purchaser on that day would be held as implement of the condition.⁴

In some forms of the minute, the obligation undertaken by the seller is to dispoise, on receiving payment of, or security for, the price. But it is objectionable that the seller should become bound to part with his lands in consideration of anything short of actual payment of the price. If he thinks fit to accept of security, it is open to him to do so, without being bound. It is the obligation to accept security which is unsuitable. The seller has the lands themselves, and he should not bind himself to part with them in consideration of any other unnamed security. There are likewise forms of the minute in which the seller, in consideration of the stipulated price, sells and dispoises the lands to the purchaser, granting him, in form, not a mere obligation to dispoise, but an actual disposition. Before the Titles Act of 1858 was passed, such a form was safe and unobjectionable, and involved no risk to the seller of losing his real right in the lands, until payment of the price; because a mere disposition, without the executive clauses of procuratory of resignation or precept of sasine (which were never inserted in a minute of sale) could not, by itself, be used by a purchaser as a direct means of divesting the seller. For divesting the seller infestment was at that time indispensable, and could be obtained only in virtue of one or other of the executive clauses, or by means of an adjudication in implement. And the seller was not bound to grant a disposition with or without executive clauses, unless the purchaser had paid or tendered payment of the price; nor would the Court, in the face of the seller's opposition, have granted adjudication in implement in favour of the purchaser, unless he had paid the price to the seller or into Court. It may be that, notwithstanding the Titles Acts, the seller would be equally safe until actual payment of the price should take place, even if, by the contract of sale, he should 'sell and dispoise' the lands; as undoubtedly it is not the meaning of the contract that he should be divested before the price is actually paid. But, as the Titles Acts dispense with precepts of sasine, and give such powers as

MINUTE
CONTAINING
DISPOSITIVE
WORDS.

¹ Baird, August 1758, M. 14,156.

² Black, 17th May 1811, Hume, 699.

³ Young, 9th March 1785, M. 14,191.

⁴ Cockburn, 31st June 1724, M. 640 & 2269.

might, in certain circumstances, authorize the expeding of a notarial instrument upon the conveyance contained in a contract of sale, it seems advisable to avoid words of actual disposition in the contract, and merely to grant an obligation, on payment of the price, to dispoise. This is all that any purchaser has an interest to ask; and under a contract framed in that way, until the price is actually paid, all claim to a real right on the part of the purchaser will be excluded.

The leading clauses to be contained in the disposition by the seller to the purchaser are set forth in the obligation we are now considering, and these are—the manner of holding; procuratory or clause of resignation; assignation to writs, and clause of delivery of writs; assignation to rents; clause of absolute warrandice, under the exception of feu-rights and tacks if any; and obligation on the seller to relieve the purchaser of all public and parochial burdens, taxes, etc., due at and prior to the term of the purchaser's entry. The form and import of these clauses have been already examined.

ERROR AS TO
SUBJECTS.

The seller must be in a position to convey to the purchaser the subjects contracted to be sold; and in case of a substantial error in regard to the seller's right to these subjects,—in case, for example, a third party has a preferable right to a material portion of the subjects, and there is a substantial error as to the identity of the subjects contracted about,—the sale will be reduced.¹ The seller, moreover, is bound to convey the precise subject sold; and in the case of a town-feu, where, in consequence of an alteration of plan, the exact area sold could not be conveyed, the purchaser was held free, and not bound to accept what was called an equivalent.² Again—where the missives of sale described the property sold as 'my property at A,' without referring to any reservations, restrictions, or conditions affecting the same, and, after the seller had brought an action of implement against the buyer, the seller's title was found to be subject to a reservation, in favour of the superior, of mines and minerals, power to make roads, etc., and also to certain restrictions in regard to building—the contract of sale was held not binding on the purchaser, *inter alia*, because he was taken to be ignorant of the reservations, etc., at the time of the exchange of the missives.³ The Lord Ordinary (Cockburn) held that the subjects sold were the lands without any reservation, and that the seller could not convey the subjects sold, because he held them only under reservations.

These cases show the importance of exhibiting the seller's titles, and furnishing to the buyer full information on all important particulars before the bargain is formally concluded.

The seller is not in all cases bound, without express stipulation, to grant the disposition in favour of a third party, though required to do so by the party who has contracted with him. In a case where a party alleged that missives of feu to him, as for himself, were truly entered

¹ Hamilton, 12th June 1861, 23 D. 1033.

² Earl of Moray, 11th June 1842, 4 D.

³ Robertson, 27th Nov. 1841, 4 D. 121. 1411.

into by him as a trustee only, the seller was found not bound to grant the charter to the alleged beneficiaries, because there was no proof that he knew of the alleged trust, or contracted with the party as a trustee.¹ This was a very special case, however; and I apprehend that, where a fee already existing is to be transferred to a new owner, the seller is bound to grant the disposition to the purchaser's assignees, if required, unless he can show good reason for objecting to do so. The seller, moreover, is not bound to dispose the lands to the purchaser to be holden *a me vel de me*, when he has an interest in granting an *a me* holding only, and there is no stipulation in the missives of sale to the effect that he is to convey with an alternative holding.² In Miller's case the purchaser of a villa-feu, burdened with a feu-duty of considerable amount, raised an action of damages against his agent for accepting a disposition from the seller containing an *a me* holding only, and procuratory of resignation, and not containing precept of sasine; and, as the purchaser founded on the single plea that the seller was bound, if required, and as matter of course, to grant a disposition with alternative manner of holding, the Court dismissed the action. The Judges in the Inner House appear to have held, that in the absence of special stipulation a seller is not bound to grant a disposition with alternative manner of holding, but only such a title as will enable the purchaser to place himself in the same position with the seller. But from the note of Lord Wood, Ordinary, it appears that the purchaser's entry with the superior had been contemplated prior to the sale, and that it was of importance to the seller that the purchaser should enter; as without his doing so the seller would have remained vassal, and personally liable for the feu-duty; and the decision should not be regarded as settling that the seller, when he has no interest to do so, can refuse to grant an alternative manner of holding. But the case shows the importance of express stipulation in the contract of sale, as to the manner of holding, whatever that is to be.

DISPOSITION TO
PURCHASER'S
ASSIGNEE.MANNER OF
HOLDING.

2. We have next an obligation by the seller to deliver, along with the disposition to the purchaser, a sufficient legal title to the lands. It is very convenient to append to this clause the nomination of some one, or of two or more individuals in succession, who shall judge of the sufficiency of the titles, in case the parties cannot agree betwixt themselves on that point. The addition to the clause for that purpose is in these words:—‘and that to the satisfaction of A., whom failing, of B., in the event of the parties not agreeing betwixt themselves as to the sufficiency of the title-deeds offered by the seller.’ An agreement of this nature may save much time and trouble. The titles to be delivered must extend to a valid legal or prescriptive progress, as it is called; and some explanation is necessary as to the meaning of the obligation so expressed.

OBLIGATION TO
DELIVER TITLE-
DEEDS.

The prescription we have here to consider is the long prescription of

PRESCRIPTIVE
PROGRESS.

¹ Campbell, as reversed, 23d May 1826, 2 Wil. & Sh. 334.

² Miller, 1st Dec. 1843, 6 D. 149.

forty years, introduced by the Act 1617, cap. 12, which enacts that 'whosoever his Majesty's lieges, their predecessors and authors, have brooked, by themselves, their tenants, and others having their rights, their lands, and other heritages, by virtue of their heritable infeftments, for the space of forty years, continually and together following the date of their infeftments, and that peaceably, without any interruption during said space, they, their heirs and successors, shall never be troubled by any person pretending right to their lands and heritages, by virtue of prior infeftments or otherwise, except for falsehood, providing they be able to produce a charter of the lands granted to them or their predecessors preceding the said forty years' possession, with the instrument of sasine following thereupon; or, when there is no charter extant, that they produce instruments of sasine, one or more, continued and standing together for the said space of forty years, either proceeding upon retours or on precepts of *clare constat*.' But, in the course of the prescriptive period, the years of minority shall noways be counted against any one.

The prescriptive title thus depends for its efficacy on Statute; but the condition of land-rights would have been very hopeless if, notwithstanding continuous and uninterrupted possession during the prescriptive period, in virtue of titles complete and correct in form, it had been still open and competent to inquire as to defects in the earlier progress. We cannot, therefore, fail to regard the Act introducing the law of prescription as an instance of the most sound practical legislation. In the words of the first Lord Meadowbank, 'it has been productive of immense tranquillity.'

In order to instruct a prescriptive progress as to subjects which have been feudalized, there must, in all cases, be an instrument of sasine recorded upwards of forty years before the plea of prescription is urged. If such instrument be in favour of an heir, and follow on a retour or precept of *clare constat* (warrants exclusively in favour of heirs), it is not necessary to produce these warrants, nor even to instruct that there existed a retour or precept of *clare constat* otherwise than by the tenor of the sasine itself.¹ And if the plea is urged by the heir himself who produces the sasine, and such heir has been in possession during the whole forty years, the recorded instrument of sasine in his favour, by itself alone, instructs the prescriptive title. There is no need of any further writing for that purpose; and objections to the precept, or other warrant, which would be fatal if stated within the forty years, are excluded by the lapse of that period of time;—for example, the objection, that the precept was not granted by the true superior;² or that sasine on the precept of *clare constat* was not passed until after the death of the superior who had granted the precept.³

TITLE OF AN
HEIR.

¹ Stair, ii. 12. 15; Erskine, iii. 7. 4; and Earl of Argyle, 15th Feb. 1671, M. 10,791.

² Miller, 7th Feb. 1767, M. 10,937.

³ Purdie, 9th Nov. 1739, M. 10,796.

Where the lands are held by burgage tenure, sasine in favour of an heir, given *more burgi* by hasp and staple, and which has no written warrant, has been held a good title on which to plead prescription, though not mentioned in the Act of 1617. Such sasine proceeds on a cognition and service of the heir before the bailie who gives it, and is really equivalent to sasine on retour or precept of *clare constat*.¹

If the instrument of sasine, recorded beyond the forty years, be in favour of one who has acquired as a disponee, and not as an heir, then it is necessary to produce, as the foundation of the prescriptive title, not only such recorded instrument of sasine, but likewise the disposition, or other warrant, on which it proceeded.² And if such disposition was not in favour of the party himself in whose favour the recorded instrument of sasine was expedite,—that is, if such party was not the grantee of the disposition, but his heir or assignee, having right to the disposition by service or assignation,—there must be produced not merely the disposition and recorded instrument of sasine, but also the intermediate connecting titles.³ But here again, as in the case of the heir, if the plea is urged by the party himself who produces the recorded sasine and its warrant or warrants, and such party has been in possession during the whole forty years, the disposition and recorded instrument of sasine, with the connecting links if there are any, will instruct a complete prescriptive title.

Within the forty years it would be competent to plead that a disposition, on which prescription was founded, proceeded *a non domino*,—as, for example, from a mere liferenter or a heritable creditor. But if, in other particulars, the requisites of the Act are satisfied, such objection would be absolutely excluded after the lapse of the forty years.⁴ In fact, as remarked by Lord Braxfield,⁵ ‘it is the great purpose of prescription to support bad titles: good titles stand in no need of prescription.’ And the party pleading prescription, on a title sufficient in itself to form a foundation for and to support the plea, is not bound to produce the prior investiture, even if extant.⁶ In Munro’s case it was alleged that the prior title was subject to a right of redemption, which ought to have been inserted in the titles founded on as supporting the plea of prescription; but the Court would not order production of the prior title, there being a subsequent prescriptive title without it.

If, however, within the forty years, the lands have passed to heirs, such heirs, if they have completed their titles, must produce their retours, or decrees of service, or precepts of *clare constat*, recorded or followed by recorded sasines, or by notarial instruments where such are competent. If the heir has made up no title, and has been possessing on apparen-

¹ Ker, 28th Nov. 1705, M. 10,813; Erskine, iii. 7. 5.

² Erskine, iii. 7. 4.

Maconochie, 29th May 1852, 14 D. 813.

⁴ Duke of Buccleuch, 30th Nov. 1826, 5 Sh. 57.

⁵ Scot, 10th Aug. 1778, Hailes, 811.

⁶ Munro, 19th May 1812, F. C.

APPARENT
HEIR.

he can plead prescription in virtue of his predecessor's title, and of his own right as apparent heir. If he be really the heir, it is not essential that his own title shall be completed by recorded sasine, or its equivalent, in order to let in the plea of prescription on his part.¹ It is essential that the possession on which prescription is pleaded shall be in virtue of a recorded sasine, with its warrant or warrants if in favour of a disponee, or a series of recorded sasines with their warrants (except that the first in date, being that which goes beyond the forty years, will stand without its warrant if in favour of an heir); but though the heir, in the case here supposed, is not himself infest, he is not possessing without infestment. He is possessing on his predecessor's recorded infestment.

Disponees who have acquired during the forty years must produce not only their recorded sasine, or a notarial instrument where such is competent, but also the warrant or warrants of the sasine or notarial instrument, or the warrant or warrants themselves with registration as equivalent to sasine. It has not been decided that a disponee can plead prescription, without being himself infest or registered. But he seems entitled to ascribe his possession to his author's infestment, as much as an heir to his predecessor's.² At all events, there seems no authority in any of our institutional writers, or in any decision, for the statement, that the interval (between the date of the conveyance in favour of the disponee, and the registration thereof, or of his infestment thereon) is to be discounted, in reckoning the years of prescription. The disponee of the heir, equally with the heir himself, can count the years of the heir's possession in apparency; and, in a question of prescription, the disponee of a disponee appears entitled to ascribe his possession to his author's recorded infestment, so long as he has not himself completed a real right by recorded sasine or its equivalent. All that seems necessary is, that the title which forms the foundation of the plea be *ex facie* sufficient to exclude; and that there be a correct and complete series of titles connecting the party who pleads prescription therewith;³ and such party has been allowed to complete his title, and produce it, even after litigiousity,—that is, when his title had become the subject of judicial discussion.⁴

ADJUDICATION.

Where the plea of prescription is founded on a decree of adjudication in security and for payment of debt,—that is, a judicial disposition of lands in favour of a creditor in security and for payment of his debt,—it is redeemable by law, by the debtor, on payment of the debt, within ten years from the date of the decree; a period technically known as the 'legal,' that is the legal term of reversion. But, if the decree be followed by charter and recorded sasine, and possession for forty years, after the term when the legal right of redemption expires, the right of redemption is excluded by the negative prescription. The charter and recorded sasine, though redeemable in their terms, then become irredeemable; the

¹ Caitechon, 22d Jan. 1791, M. 10,810, and Miller before cited.

² Waddell, 19th June 1828, 6 Sh. 999.

³ Stair and Erskine, as above; and Earl of Argyle's case, before cited.

⁴ Crawford, 20th Dec. 1822, F. C.

right of redemption being a personal claim, which is cut off if not enforced during the years of prescription.¹ But, if the decree of adjudication is followed only by possession, it continues a mere redeemable right. It is no better than an ordinary disposition without sasine.²

The Act, in its terms, relates only to titles completed by charter, or other warrant, and recorded sasine; but there are cases where sasine is not necessary,—as, for example, that of an unfeudalized right of patronage, or an allodial subject. In these, the plea of prescription may competently be founded on a disposition, decree of adjudication, or other personal title, without sasine, but followed by uninterrupted possession for forty years; or, in the case of a decree of adjudication for debt, for forty years after expiry of the legal right of redemption.

In all cases, the writings founded on must be free of intrinsic objections; for example, any charter or disposition, forming part of the legal progress, must be probative. An instrument of sasine in the old form must bear delivery of the appropriate symbols; and, in both the old and the new forms, must be duly authenticated. And, where a decree of adjudication against a married woman is founded on, such decree must be against her husband for his interest, as well as against her. It has been decided that the extract of a recorded sasine is not a good title on which to plead prescription.³ Professor Bell⁴ doubts the soundness of this judgment; and Mr. Duff⁵ suggests that the ground of the prescription is the register, not the extract; and that, by means of the register, the tenor of the instrument of sasine may be proved. Accordingly, in Cumming's case, the tenor of the sasine was allowed to be proved. If, therefore, the principal instrument of sasine be lost, it would apparently be necessary, in establishing a prescriptive title, to prove the tenor of it; that is, to bring an action in the Court of Session, in which the form and words of the whole instrument, from beginning to end, are proved to the Court, and the Court's decree, containing a copy of the instrument, is declared to be of equal effect with the principal instrument. The leading distinction between such a decree, and the extract of an instrument of sasine (as connected with the plea of prescription), appears to be that, whereas the decree is declared by the Court to be of equal force with the principal, even in cases of improbation, the extract from the register of sasines is, by the Acts introducing the registers, declared *not* to be of force in such cases. If improbation, therefore, be attempted, the extract cannot be founded on in support of the sasine. The decree of proving the tenor is thus in all respects equivalent to the principal, whilst the extract from the register of sasines in the above important particular is not; and, as the Act introducing prescription expressly requires sasine as the title, or the foundation of the title, of the

EXTRACT OF
SASINE.

¹ Caitechon's case, before quoted; Bell's Principles, 2012.

² Ormiston, 7th February 1809, F. C.; Stewart, 26th Nov. 1811, 1 Bell's Comm. 706.

³ Cumming, 19th November 1680, M. 10,785.

⁴ Bell's Principles, 2010.

⁵ Duff's Feudal Conveyancing, p. 175.

party stating the plea, the requirements of the Act are not satisfied with what is less than a full equivalent to a principal instrument of sasine.

As regards the period of possession, the years of minority of any party against whom prescription is pleaded are to be deducted.¹ But, when prescription is running against an entail, it is the minority of the heir in possession only, not of any substitute heir, that is to be taken into account. The heir in possession, as fiar of the estate, represents the whole body of the heirs as to that matter.²

POSSESSION.

The possession, however, must be of the highest description of which the subject is capable. Thus, in the case of a salmon-fishing, the exercise of the right must be by net and coble where practicable.³ And in the case of the patronage of a parish, a single act or exercise, though the minister presented shall have enjoyed the benefice for more than forty years, does not conclusively let in the plea; because, in such case, without at least two consecutive acts, there is not *continued* possession on the part of the patron.⁴

There must be both a regular and valid title, or progress of titles, and forty years' continued possession in virtue thereof. The proprietor of a burghage tenement sold and disposed one storey of it in 1792, but the purchaser did not take infeftment. In 1793, the proprietor disposed gratuitously to his wife the whole tenement, without excepting the storey previously sold; and his wife was infeft in the whole in 1794. The purchaser of the storey died; and in 1837 his heir obtained himself infeft in said storey, in virtue of the disposition granted to his predecessor in 1792, and his own service as heir; and he and his predecessor possessed the said storey from 1792 until 1860 without interruption. In the meantime, the wife's right passed in 1853 to a singular successor, who was duly infeft in the whole tenement. Some years afterwards he endeavoured to remove the heir of the purchaser of 1792 from the storey then purchased. But the Court held that neither party had acquired a title by prescription; and that the title of the heir of the purchaser of 1792 was preferable as in right of an onerous disponent, while the original disposition by the common author to his wife granted in 1793 was gratuitous.⁵

The possession must be continued and uninterrupted for the full space of forty years. For example, in the case of a right of salmon-fishing, possession for ten years, with discontinuance for the next ten years, and so on during four similar periods, would apparently not found the plea of prescription, notwithstanding that the possession extended to forty years in the whole; because it was not continued and uninterrupted during forty years *consecutively*. This is a matter of considerable importance, especially in connexion with the claim to a right of salmon-

¹ Blair, 6th Dec. 1754, M. 11, 156.

² Macdougall, 12th July 1740, M. 10, 953; and Mackay, 23d Nov. 1798, M. 11, 171.

⁴ Macdonnell, 26th Feb. 1828, 6 Sh. 600.

³ Duke of Sutherland, 11th June 1836,

14 Sh. 960.

⁵ Anderson, 13th Nov. 1863, 2 Macph.

100.

fishing founded on titles which contain only *fishings* generally, not expressly *salmon-fishings*. There appears to be no doubt that, if the right of salmon-fishing is duly exercised, for forty years consecutively, upon a title containing *fishings* generally, such title will support the right to salmon-fishing in perpetuity; whereas, if not followed by such possession, it will not. In connexion, therefore, with the possession of salmon-fishings founded on titles expressing only the right to *fishings*, it will be necessary to ascertain that there has been possession sufficient to give to the term *fishings* in the titles the meaning and import of *salmon-fishings*. There are various other rights connected with lands to which the above observations might be extended.

It may further be observed, that as the original feu-right of lands is the ruling title in regard to the reservations, conditions, etc., under which the lands are held, and such reservations, conditions, etc., may subsist in full force though omitted and unnoticed in charters by progress extending over more than forty years, it would seem necessary, as a general rule, for a purchaser to inspect the original feu-right in order to see its terms.¹ And purchasers of superiority ought, in like manner, to see the original feu-right of which they are to be superiors; because such feu-right may contain obligations of relief of public burdens or similar obligations, which, though not expressed in the charters by progress, and even though never imported into the record, will affect and burden singular successors in the superiority.²

We shall now proceed to consider more particularly the practical import of the obligation of the seller to furnish a valid legal progress of titles, and the nature of the title to be furnished. And here it may be laid down as a rule, that, where there are objections to the title such as go to annul the right and power of the seller to sell and convey the lands, there can be no obligation on the purchaser, unless the bargain was distinctly a transaction of speculation or hazard. If, for example, the lands are found to be validly entailed, or if the seller is a mere liferenter, or if he cannot implement his part of the contract by producing a valid title, in such cases he has it not in his power to give what he bargained for; and the transaction for the sale necessarily comes to an end.³ And, where the seller's title was originally limited and defective, being founded on an adjudication for debt obtained in absence against a minor, and followed by charter and sasine, the purchaser was found entitled to reject it, even after expiry of the forty years, usually sufficient to found the plea of prescription in adjudication cases;—apparently because the minority might authorize the counter-plea of interruption or suspension of the course of the prescription.⁴ The purchaser may also reject a title, defective as founded on a sasine in favour of a singular successor without its warrant, although followed by forty years' possession. And in no

¹ See Hutton, 11th Nov. 1863, 2 Macph. 79.

² Hope, 20th Feb. 1864, 2 Macph. 670.

³ Robertson, 18th July 1840, 2 D. 1494.

⁴ Little, 14th Feb. 1749, M. 14, 177.

case is it a good answer to a valid objection to a prescriptive title that the seller grants absolute warrandice; because such warrandice is a mere personal obligation.¹ The purchaser is even entitled to withdraw from the transaction, if the right of the party selling is subject to rational doubt, and if the doubt is not timeously removed.² In Brown's case, Lord Medwyn remarked, 'The point is not so much whether there is much probability of eviction, or of any party challenging the title, as whether it be such a title as would be taken by a purchaser without objection,' etc.

**DELAY IN
GIVING TITLE.**

The seller is bound not merely to give a valid title, but to give it within a reasonable time. This is sometimes made the subject of express stipulation; and, where a title was stipulated for by a fixed date, delay of fourteen months thereafter was found to free the purchaser.³

But express stipulation is not essential in order to the purchaser becoming free. In the case of Fleming,⁴ the seller failed to produce a title within three years, and the purchaser was found entitled to resile. But, where the title is not stipulated for within a given time, a reasonable time will be allowed to discuss questions arising upon the titles; and, where there was no stipulation as to the time, a delay of six months after the sale was held not to entitle the purchaser to resile.⁵ And if the purchaser, after successfully objecting to the validity of the title offered, does not abandon the purchase, but requires fulfilment, he has been held bound to implement his part upon a valid title being offered, though only after the lapse of eleven years.⁶ But where the purchaser objects to the title, and, after the seller has proposed in writing to cancel the transaction, and in a second letter has said, 'I hold the bargain at an end,' the purchaser, if he has not timeously objected, will be held to have acquiesced in the proposal to cancel the transaction. A purchaser in such circumstances was not allowed, at the distance of three years, to insist for implement of the bargain.⁷

It may often be of essential consequence to a purchaser to have a title within a short limited time, especially in connexion with ground to be given off for building purposes; or where the purchase is of a speculative character; or where part of the price is to be borrowed on the security of the lands. In such cases, and generally where there is any existing defect in the titles, it may be well to stipulate that, if a title is not given within a limited time specified, it shall be in the option of the purchaser to resile. It seems advisable not to make a declaration of absolute nullity, but to give the purchaser the option of resiling.

The cases we have been considering are those in which the seller's right is radically bad, or where, from neglect or some other cause, he cannot or does not timeously furnish a sufficient title. But a material

¹ Nairne, 17th June 1676, M. 14,169.

² Brown, 6th Dec. 1833, 12 Sh. 176.

³ Hutchinson & Son, 22d Jan. 1830, 8 Sh. 377.

⁴ Fleming, 6th June 1823, 2 Sh. 373.

⁵ Raeburn, 5th July 1832, 10 Sh. 761.

⁶ Dick, 1st Oct. 1831, 5 Wil. & Sh. 712.

⁷ M'Neill, 21st Jan. 1830, 8 Sh. 362.

difference arises when the seller's title is only defective, and he can remove the objections to it, and when, notwithstanding delay on his part, the purchaser requires implement, and does not wish to resile. In these circumstances, if the missives or contract of sale simply bind the seller to give a valid title, or even if they are silent as to the title to be given, the seller is bound, at his own expense, to make his title unexceptionable.¹ The purchaser has undoubted right to a good and valid title, if it can be given, and if he has not waived it.² And, where the title was liable to reasonable doubts, the purchaser was found entitled to the expense of removing them, though that was done in a process in which his objections were repelled.³ Moreover, in a case where there appears to have been no reasonable doubt of the sufficiency of the seller's title, but there was a risk of the purchaser being exposed to trouble and expense in discussing questions to which the defence was the forty years' prescription, the Court required the seller to take steps in order to obviate that risk.⁴ It was here held that the purchaser of an estate for an adequate price was entitled not merely to a title which would secure him against risk of eviction, but to one so free from fault as to secure him against risk of trouble or expense. In general, however, missives or contracts of sale do not impose an absolute obligation on the seller to give a good and valid title. It is usual to stipulate either that the title shall be given at the sight and to the satisfaction of an arbiter named, or that the purchaser is to accept the title as it stands, and as contained in certain writs exhibited as per inventory; or if there is any deficiency, as, for example, if the sale is by an heir who has not yet made up his title, the mode of making up the title will be specified, and the purchaser will be taken bound to accept the title so made up, or to be made up, as sufficient.

The provision, that the title is to be accepted as it stands, does not compel the purchaser to pay for lands to which the seller is absolutely unable to give him a title, or even to abstain from discussing a question affecting the seller's right to the lands he has contracted to sell.⁵ In Waddell's case, the titles had been examined by the purchaser's agent before the exchange of missives of sale, but still the right of objection was allowed. The Court, however, will not permit the purchaser, under missives with such a provision, both to retain his purchase and object to the title. He cannot found on the missives, as giving him right to the lands, without subjecting himself to the condition in the missives, that he is to accept the title as it stands. The Lord Ordinary said, 'The purchaser must either accept the titles as they are, or give up the bargain. Retain the subject, and object to the titles, he cannot.' But if the seller has the right inherently in himself, and his title is only defective, the question (which arises under the missives of

WHERE TITLE
IS ONLY DEFEC-
TIVE.

PROVISION AS
TO ACCEPTANCE
OF TITLE.

¹ Smith, 13th Feb. 1827, 5 Sh. 340.

² Dick, as reversed, 12th December 1826,
2 Wil & Sh. 522.

³ Kerr, 12th June 1852, 14 D. 864.

⁴ Dunlop, 26th May 1850, 11 D. 1062.

⁵ Waddell, 19th June 1828, 6 Sh. 999.

sale with the provision that the purchaser is to accept the titles as they stand, or are to be made up) resolves into one of expense; and the purchaser must take the lands, and supply the defect in the title on his own costs. He is neither entitled to reject the purchase, nor to throw the burden of supplementary titles, if any are required, on the seller.¹ In Carruthers' case, Lord Gillies said, 'There could be no doubt that the substantial right to the property was in the seller; and it would be a libel on the law to say that, where a party had a legal right to property, there was no mode of completing the title.' But the cases show plainly the importance of examining the titles, before making or accepting an offer for the purchase with the stipulation that the title is to be taken as it stands. It is obvious that the titles offered in Rowand's and Hay's cases were not such as a purchaser for a full price would knowingly have agreed to accept,—they were not what is technically termed 'marketable,'—and, even in the case of a purchase without special stipulation of the above nature, the previous examination of the titles may be important; because it sometimes happens that titles are such as to authorize no valid legal objection, while at the same time they are open to grounds of suspicion. Take, for example, the case of a title depending on a decree of adjudication, obtained against a party abroad, and not heard of for many years, and who may have been dead at the time it was led; or depending on a service as heir to a very remote ancestor, where it may have been impossible to prove the extinction of all the intermediate heirs. In these, and many other cases, there may be no tangible fact on which the title can be held null. The purchaser may therefore be compelled to accept it; while, at the same time, it may be a very unsatisfactory title, and one on which he would not have made the purchase had he been timeously acquainted with its nature. I will only add, in reference to the above observation, that a purchaser, who has committed himself to accept a title exposed to the risk of such objections as those named, is placed in a rather awkward position. Because, if he wishes to sell the subjects, he will have to grant absolute warrandice, and thereby become personally liable, to the extent of his whole means, for the sufficiency of the title. This might be of no great consequence if the subjects were not to be improved by buildings thereon, or otherwise; but it may happen that the new purchaser erects valuable houses or works on the lands, so that, in case of eviction, the claim on the first purchaser may be ruinous. The result is that, when a party has acquired lands with such a title as is here indicated, he will often find them unmarketable, or, as a measure of prudence, will not even attempt to bring them into the market. He knows how he stands as long as he retains the lands; but he cannot tell what claims may arise if he sells with absolute warrandice.

¹ See on this subject Rowand, 24th Nov. 1769, M. 14,178; Hay, 10th July 1783, M. 14,183; Anderson, 4th Dec. 1818,

F. C.; Carruthers, 26th May, 1825, 4 Sh. 34; Sorley's Trustees, 14th Feb. 1832, 10 Sh. 319.

In the cases we have been considering, the seller's right to the lands has been bad or doubtful, or his title incomplete. But it may be alleged that, before entering into the minute of sale, he had contracted to sell the lands to some third party. If the sale be completed, *bond fide*, in ignorance of any allegation as to a former sale, the purchaser will be safe; but supposing that, whilst matters are entire, the purchaser receives intimation of the alleged former sale, and an action of implement of that sale is brought against the seller, to which the purchaser is called as a party, in such circumstances the purchaser is warranted in declining to complete the transaction, until he receives security or satisfaction that he can safely do so. And, though the alleged former sale shall not be proved, the purchaser will not be liable in interest on the price, until the seller is in a situation to complete the transaction;—assuming always that the purchaser has not been in possession of the lands.¹

The obligation or stipulation relative to incumbrances next requires SEARCHES. consideration.

In general, an express engagement is given by the seller to furnish a certificate of search in the records for incumbrances during forty years; and, if the missives are silent on the subject of searches, the seller is bound to give a forty years' search.

We have already seen that since the year 1617 registration has been necessary, in order to the perfecting of a real right to lands; and that, by the Sasines Act of 1845, a sasine is literally a nonentity until it is registered. So also is a notarial instrument by the Titles Acts. We have seen also, that sasines and notarial instruments, or conveyances of proper feudal subjects, can be registered either in the local registers applicable to the particular place or district within which the lands are situated, or in the General Register kept at Edinburgh for the whole of Scotland. For sasines of lands within the territories of royal burghs, and held burgage, and notarial instruments and conveyances of such lands, registers are established in each burgh; and such sasines, notarial instruments, and conveyances cannot be registered either in the General Register at Edinburgh, or in the Particular Register established for lands beyond the burgh.

Voluntary securities granted over lands for borrowed money were in use to be constituted and transferred on the same principles as those applicable to rights of property in such lands; and the statutory rules regarding registration embraced the sasines applicable to real securities over lands, as well as those by which the right of property in the lands was completed. Such securities may still be constituted and transferred by means of the deeds and instruments formerly in use; but the forms of deeds introduced, as to the transference of securities, by the Heritable Securities Act of 1845,² and as to both their constitution and transference by the Heritable Securities Act of 1847,³ have superseded the

¹ Rodger, June 24, 1859, 21 D. 1022. ² 8 & 9 Vict. c. 31. ³ 10 & 11 Vict. c. 50.

older deeds and instruments, both as regards burgage and proper feudal subjects; and sasines, with all the relative formalities, have been dispensed with in reference to voluntary securities. Registration remains necessary, and is, in fact, the means by which the rights to such securities are now made real. And the registers available for voluntary securities over lands are, respectively, the same as those applicable to property rights in the lands. Securities, however, may also be constituted over lands by the judicial process of adjudication, and negatively by the legal diligence of inhibition;—the former (that is, adjudication) being substantially a disposition by the Court to a creditor of his debtor's lands, in security and for payment of his debt, but subject to a legal right in the debtor to redeem the lands, by paying up the debt within ten years from the date of the decree.

ADJUDICATION. An adjudication creates a valid security over the lands, without the necessity of sasine following on the decree, or the registration of the decree; and burdens arising by adjudication do not very often appear in the Register of Sasines. A special register has been provided in reference to adjudications. The decrees were formerly of great length, very often containing much more than it was of any importance to place on the register; and the Act 1661, cap. 31, sanctions the practice of recording a short abstract, now known as the 'abbreviate,' containing the essentials of the decree, particularly the names of the debtor and creditor, the sum due, and the lands affected, which are the main contents of an ordinary deed of voluntary security. And unless sasine, or registration of the decree as equivalent thereto, follows on the decree, which is a competent mode of completing the security, the abbreviate of the decree requires to be entered in the Register of Abbreviates of Adjudications; which being done, the security or right which is constituted is good against all and sundry. The same register, in this case, embraces burgage as well as proper feudal subjects; and there is no particular or local register of abbreviates of adjudications.

INHIBITION. Inhibition is a prohibitory or preventive diligence, issued under the Signet, in name of the Sovereign, at the instance of a creditor against his debtor; in virtue of which, messengers-at-arms, in name of the Sovereign, inhibit (or prohibit) and discharge the debtor from selling or burdening his lands,—and likewise the lieges generally from contracting with the debtor in prejudice of the creditor. For this diligence, separate registers were established by the same Acts as those applicable to interdictions; and, in order that the inhibition may be effectual against third parties, it requires to be recorded, either in the register kept for the shire within which the debtor resides and has his lands, or in the General Register kept at Edinburgh for the whole of Scotland.¹ The registers of inhibitions apply to burgage as well as proper feudal subjects.

Some other burdens may exist and be valid even as against third parties, without being embraced in any special instrument of sasine, or

¹ The Acts are 1581, c. 119; 1600, c. 13; 1672, c. 16, s. 32.

other deed or instrument, and some without being made public through a register. To these your attention will by-and-bye be called. The registers, through which the burdens we have been referring to are made valid and effectual, are,—

For securities voluntarily constituted over proper feudal subjects, the General and Particular Registers of Sasines; and over burgage subjects, the registers of sasines within the burghs respectively.

For judicial securities by adjudication, whether over burgage or proper feudal subjects, the Register of Abbreviates of Adjudications; and,

For securities by the diligence of inhibition, whether over burgage or proper feudal subjects, the General and Particular Registers of Inhibitions.

The current books of all these registers are kept by particular officials; those applicable to the General Registers of Sasines and Inhibitions, and the Register of Abbreviates of Adjudications, in Edinburgh; those of the Burgh Registers of Sasines by the town-clerks of the burghs, and within the burghs respectively; and those of the Particular Registers of Sasines and Inhibitions, within the districts to which they are respectively applicable. The books of the Burgh Registers of Sasines remain permanently with the clerks of the burghs. Those of all the other registers of sasines kept in the country are transmitted, as soon as they are completed, to the General Register House in Edinburgh, and are deposited there with the registers of sasines kept in Edinburgh by the keepers of the records, acting under the direction of the Lord Clerk-Register and his deputed. Searches in the registers can be made by any one; the register books being open to all for that purpose, on payment of a fee for the use of the books. But purchasers of lands are not bound, without express stipulation, to accept of searches for incumbrances made by any one not officially authorized to do so. Accordingly, searches in the registers kept in Edinburgh, and in the district or particular registers, so far as transmitted to Edinburgh, are usually made by searchers of the records appointed for that purpose by the Crown,—searches in the district or particular registers, so far as not transmitted to Edinburgh, by the keepers of such registers respectively, and in the burgh registers by the town-clerk. And the engagement or liability of the seller, to furnish a certificate of search in the records for forty years for incumbrances affecting the lands sold, requires him to exhibit such certificate, in the case of proper feudal subjects, under the hand of one of the authorized searchers of the records, in the General Register of Sasines and appropriate Particular Registers of Sasines, so far as transmitted to Edinburgh; and under the hands of the keepers of the Particular Registers respectively, so far as not so transmitted; in the case of burgage lands, under the hand of the town-clerk of the particular burgh, in the Register of Sasines for the burgh; and, in all cases, under the hand of the searcher in the General Register of Inhibitions, and Particular Register of Inhibitions so far as transmitted, and in the Register of Abbreviates of

Adjudications; and, so far as the Particular Register of Inhibitions is not transmitted, under the hands of the keepers.

**SEARCH FOR
INHIBITIONS.**

There is apparently no particular caution necessary as regards the searches in any of these registers, except those of inhibitions. But, as the diligence of inhibition affects not only lands belonging to the debtor at its date but also lands afterwards acquired by him, the search applicable to each owner successively, if there have been more than one, must go back to a date forty years before the date of the certificate, supposing the owner to be forty years of age, or to the date of his birth, if he is not so old. It is not enough to commence the search for inhibitions against a proprietor as of the date of his acquiring the lands. Thus, supposing the seller to have acquired the lands only ten years before the sale, the search for inhibitions against him will be not for ten years, but for forty years,—or to the date of his birth, if within that period.

The certificates applicable to inhibitions will disclose interdictions, if there are any. The certificate in the adjudication register will disclose a mercantile sequestration, if there has been such; and those in the registers of sasines will disclose property titles, if any exist in addition to those exhibited. It may sometimes, indeed, be thought necessary to carry the search in the registers of sasines back beyond the forty years, so as to include the sasine on which the prescriptive title is founded, and to show that there is no sasine intermediate between it and the next connecting link in the title,—to show that the party, on whose title that of the seller depends, was not divested. The rule of practice is not to go beyond the forty years of the search. But if there are any circumstances to excite doubt or suspicion, either as to the title or as to incumbrances, it will be proper to carry the search back as far as necessary to give the assurance that there is no title or incumbrance besides those exhibited or disclosed.

**REGISTER OF
ENTAILS.**

If there is reason to suspect that the lands have been included in any entail, or if they are held under an entail said to be unrecorded, a search in the Register of Entails will be necessary; and that search must go back to the date, or supposed date, of the entail. The term of forty years has no significance in the case of an entail said to be unrecorded.

**REGISTER OF
INTERRUPTIONS
OF PRESCRIPTION.**

In circumstances of suspicion, a search in the Register of Interruptions of Prescription may also be necessary or advisable. That register is kept in Edinburgh.

When lands have been long in the hands of the same proprietor or his family, and the seller is well assured either that there are no incumbrances, or that he is aware of the state of the incumbrances, it is not unusual for him to say that he knows of no burdens, or of none except certain debts or obligations specified; and to stipulate that he shall not be bound to exhibit searches; but that, if the purchaser thinks fit to make searches, and discovers any incumbrances not disclosed by the seller, and still subsisting, then the seller shall be bound not only to clear such incumbrances, but likewise to pay the expense of the

search. In the absence of special agreement to the contrary, the seller is bound to disburden the subjects sold, and to clear the record of all incumbrances truly affecting or burdening the lands; and, when lands were sold with a stipulation that, if the purchaser should make a search and discover any burdens, the seller should relieve the lands of the incumbrances, the seller was held bound to clear the record of an adjudication recorded more than forty years before the sale; although the purchaser did not deny that the debt was paid.¹

Generally speaking, the seller of lands burdened with a feu-duty is *FEU-DUTY*. not bound to clear the lands of the feu-duty. It is, for the most part, the understanding and agreement of parties that the purchaser is to bear the burden of the feu-duty, in consideration of which he pays a smaller price. But where lands had been sold for £10,000, with a stipulation that the purchaser should hold them of the seller, as his superior, for payment of one penny Scots yearly; and the seller's title, which was not exhibited till after exchange of the missives, showed that he held the lands subject to a yearly feu-duty of £340 sterling, and ten bolls of barley, the value of which was nearly equal to that of the whole lands,—the Court held the agreement to imply that the purchaser, for the price paid by him, should acquire and hold the lands subject to no feu-duty payable to any person greater than that stipulated in the missives of sale; and that the seller was bound to disencumber the lands of the large feu-duty, or give security against liability therefor.²

Moreover, a purchaser who has private knowledge of the existence of burdens on lands is, as a general rule, entitled to require the discharge of these burdens, although they have not been made real by means of any register.³ In *Ralston's case*, a son, to whom lands had been conveyed by his father, burdened with provisions to his sisters and younger brothers, made up titles to these lands as his father's heir-at-law, and without reference to the burdens. But the purchaser was made aware of the father's purpose that the burdens should be made real, by having the father's settlement exhibited to him before he paid the price; and he was found not bound to take the title without seeing these burdens satisfied. The same rule holds to prevent purchasers from claiming, under their dispositions, rights which they privately knew, before purchasing, that the sellers could not give them.⁴ But, where lands were sold under the powers in a bond and disposition in security, and by the articles of roup it was declared that the seller should not be bound to clear the record of any incumbrances affecting the property subsequent to the date of his own bond, the Court, in respect of the express terms of the articles, refused to require the seller to discharge a subsequent bond.⁵

We meet with one exception to the rule that all incumbrances must

¹ Mitchell, 27th November 1827, 6 Sh. 135.

² Paton, 11th March 1825, 3 Sh. 653.

³ Ralston, 17th June 1830, 8 Sh. 927.

⁴ Lang, 29th June 1813, F. C.; Magistrates of Airdrie, 12th July 1850, 12 D. 1222.

⁵ Young, 19th July 1849, 11 D. 1482.

REAL WARRANT-
DICE.

be cleared, in the case of *Durham's Trustees*;¹ but it is more apparent than real. In 1689 lands had been sold and disposed, and other lands had been disposed in real warrantice thereof,—that is, with a provision that, in case the lands sold (in such cases called the principal lands) should be evicted, the purchaser should have right to take as much of the warrantice lands as should be equal in value to the lands evicted. The principal lands had been possessed, without challenge, for upwards of a hundred years. The warrantice lands, in the almost impossible case of the principal lands being evicted, were still open to a claim at the instance of the proprietor of the principal lands; and, the warrantice lands having been sold, the purchaser thereof required a discharge of the right of real warrantice granted in 1689. But, in the circumstances, the Court thought him 'too scrupulous,' and dismissed his claim. The case, however, was one of circumstances; and it is not to be understood as settling that, in no case, is a seller bound to discharge a right of real warrantice affecting the lands sold. It is advisable, however, when rights of that nature are known to exist, to condescend upon them, and make their discharge, or their continuance undischarged, the subject of special stipulation in the missives of sale. If that is not done, the seller may, without any adequate reason, be involved in a very awkward difficulty, because real warrantice rights are not redeemable. The seller has it not in his power to force the holder to give them up; and if they are not of old date, and the title of the principal lands is not fortified by prescription, the purchaser cannot be expected to pay the price without getting some special security against claims under the real warrantice right. This remark applies especially to the case of lands acquired in excambion, which are subject by law to mutual rights of real warrantice. In transactions as to such lands, it may sometimes be necessary to satisfy the purchaser, not only that there are no burdens on the lands he has bought (the principal lands, so to speak), but none affecting the lands in exchange for which these were acquired, and on account of which the principal lands can be evicted.

It not unfrequently happens that discharges of debts cannot be procured and delivered, on the day fixed for settlement of the purchase. And in such cases it will, in general, be found safe and convenient to deposit in bank the amount of such debts, and a moderate sum over and above to cover interest and expenses, in the joint names of buyer and seller, and to get these parties to sign a relative minute (which should be probative), stating that the sum has been deposited because the debt in question has not been discharged; and that, on a valid discharge thereof being exhibited, the money is to be uplifted and (with the accruing interest) paid over to the seller; he being always bound to register the discharge, and deliver the same when registered to the purchaser, free of expense to him. It may, however, be the agreement of parties (the creditors concurring) that certain existing debts are to

¹ *Durham's Trustees*, 9th July 1800, M. 16,641.

remain burdens on the property, the purchaser becoming the debtor therein in place of the seller; in which case the disposition ought to declare such debts real burdens on the property. A form for this purpose is given in the *Style Book*.¹ The debts will thus, beyond all question, be made to attach to the lands; and, as the personal obligation of the purchaser is to be substituted for that of the seller, the creditor will grant to the seller a discharge of his personal obligation, reserving the real security constituted over the lands; and the purchaser will grant his bond of corroboration to the creditors, binding himself personally for payment of the debt.²

When existing debts, forming burdens on the property, are to be undertaken by the purchaser, care should be taken to obtain from him a personal obligation in favour of the creditor. In one case,³ the purchaser had become bound merely to relieve the seller of the debt, but had granted no obligation to the creditor; and, the purchaser having become bankrupt, the creditor was found not entitled to be ranked as a creditor on his estate in respect of such debt. Conveyancers, however, are not partial to this mode of dealing with existing debts secured on lands purchased. It has never been formally decided that the real security created by a bond and disposition in security subsists and is effectual, after the personal obligation contained in such bond is discharged; and many persons object to lend money on such securities. The objection on that ground is obviated by making the debts real burdens by means of the disposition to the purchaser. But a security by real burden is, in several respects, inferior to one by ordinary bond and disposition in security; in particular, it does not contain power to sell the lands in case of failure in payment of the money when required.

Formerly it was of some consequence to allow existing securities to remain burdens on properties, and to avoid granting securities entirely new, because of the expense of the new securities. But now there is no such object; and unless it be of importance to keep up an old debt, because it is a first or preferable charge on an estate, it is clearly advisable, even when such debt is to remain unpaid, to discharge the old security entirely, and take a new one in the form introduced by the Act of 1847,⁴ and with all the privileges given by the Act. When the old debt is to remain, however, you will observe that it should be declared a real burden on the lands by the disposition in favour of the purchaser. In that way there will be a valid real security over the lands, whether the real security constituted by the original bond and disposition in security is at an end or not.

A widow's right of *terce*, or husband's right of *courtesy*, has no *TERCE AND* sasine separate from the sasine of the deceased husband or wife; but the *COURTESY*.

¹ *Juridical Styles*, vol. i. p. 150.

² Forms of the discharge and personal bond of corroboration applicable to this

case will be found in the same volume of the *Juridical Styles*, pp. 640, 734.

³ *Kippen*, 24th Feb. 1852, 14 D. 533.

⁴ 10 & 11 Vict. c. 50.

searches and titles exhibited will always show when such rights exist. When such rights are in operation, care must be taken either to obtain discharges of them, or the consent of the parties to the disposition in favour of the purchaser; or to secure the purchaser by retention of the price, or in some other way. The purchaser has right to retain part of the price until the claim of terce is disposed of.¹ Indeed, he has right of retention as against all burdens and real grounds of eviction, unless he has waived his right.

SERVITUDES.

As to servitudes, our law is as yet defective; inasmuch as it allows efficacy to rights of that nature without their entering any record. Against such burdens the seller's personal warrandice is all the security that can be obtained. But although, in the case of burdensome servitudes (such as prohibitions against erections of a certain class of buildings in the case of a town-feu), the seller cannot enforce implement of his contract, unless he procures the discharge of the burden;² yet, if the servitude be of a light description, and such as lands are not unfrequently exposed to, it will not authorize any claim against the seller.³

SUCCESSION-DUTY.

Another burden to be guarded against is the succession-duty on lands, imposed by the Act of 1853,⁴ and which is declared a first charge on the interest of the successor in the lands on account of which it is payable. Where, therefore, lands have been the subject of a succession since that Act came into operation, it is necessary to see proper vouchers of the discharge of the succession-duty.

JUDGE WARRANT.

And, in the case of burgage subjects, there may be burdens for repairs, under what is called the Jedge Warrant of the Dean of Guild Court.⁵

ANNUITIES.

In connexion with the evidence of the extinction of incumbrances, it may be convenient, in cases where annuities have been made real burdens on lands, to preserve evidence both of the death of the annuitant, and of the discharge of the last two or three payments of the annuity; and specially of any payment made after the death of the annuitant. Delivery of the bond of annuity should also be obtained, if possible. If the annuity has been vested in trustees, it seems advisable to take and record a discharge from them, after the death of the annuitant.

LEASES, ETC.

I have already adverted to the burdens which may arise in favour of tenants, either under express stipulation in their leases, or without stipulation, by mere local custom. And to avoid, as far as possible, the danger of having unexpected burdens thrown on the purchaser, the leases should always be examined before the sale is concluded. After the missives are exchanged, and assuming that there has been no undue concealment, it is too late to find out that there are burdens of that nature which affect the purchaser. It is well, also, to see that the leases are duly stamped. They cannot be sued on if they are not; and the seller

¹ See Boyd, 7th March 1805, M. 15,874.

² Urquhart, 2d June 1835, 13 Sh. 844.

³ Gordonston, March 1682, M. 16,606.

⁴ 16 & 17 Vict. c. 51, s. 42.

⁵ On this subject see Juridical Styles, vol. i. p. 580.

ought to relieve the purchaser of the stamp-duty and penalty incurred through his own omission.

I may here notice, though not strictly connected with the subject of **TEINDS**, ordinary incumbrances, that the state of the teinds is a matter often of great importance in connexion with the value of lands, and their contingent liability to be burdened. The various points connected with teinds, to which, in particular cases, your attention should be directed, are too numerous to be entered on here in detail.

I shall only remark—(1.) That teinds are the portion belonging to the church, or those in right of the church, of the rents or fruits of the soil, and are burdened with the stipends payable to the ministers of the Established Church; (2.) That, under early Statutes, it is lawful to have the teinds of lands valued, and the amount thereof fixed for ever afterwards, according as it stands at the time of the valuation, whatever may come to be the amount of the yearly rent of the lands, and whatever might have been the amount of the teinds independently of the valuation; (3.) That teinds, to which the proprietor of the lands has no heritable right (unless bishops' teinds), are liable to be charged with stipend, before teinds to which there is such right can be burdened. Bishops' teinds are teinds formerly attached to archbishoprics or bishoprics, which are now Crown property; (4.) and that teinds to which there is no heritable right belong to the Crown, or some private party, subject to the burden of the stipend; and the amount, subject to that burden, must be paid to the Crown, or private party in right thereof. Purchasers, therefore, are in general materially interested to see whether or not there is a heritable right to the teinds,—whether the teinds are valued or not,—and what is the amount of the free teind available for future augmentations of stipend.

I have explained the mode in which to ascertain whether burdens **LITIGIOSITY**, have been made public through the registers, or by leases, and in some other ways. But there are certain burdens against which an ordinary search, even accompanied by the examination of titles and leases, affords only a partial protection, if any at all. For example, the ordinary search does not profess to disclose burdens or restraints upon alienation created by litigiosity,—which arises by the commencement of diligence or action, at the instance of a creditor or other party, for attaching his debtor's heritage, or for annulling the title to it. Where, for example, the diligence of inhibition is being used, litigiosity commences with the messenger's execution against the lieges prohibiting them from voluntarily acquiring any right from the debtor. This is called the publication of the letters of inhibition. And a sale by the debtor after such publication will be struck at by the inhibition, provided the inhibition and executions be recorded within forty days after the publication. To guard against this, a search can be made at the Signet Office. All inhibitions pass the Signet, upon bills or petitions addressed by the creditor to the Lords of Session praying for the inhibition. Upon these

bills the clerk writes an interlocutor '*Fiat ut petitur*;' and the bill, with this interlocutor, becomes the warrant of the letters of inhibition, and, as such, is retained at the Signet Office. By a search at that office, therefore, it can be ascertained whether any letters of inhibition have been issued; and, if so, due precautions can be used for obtaining protection against them. The warrant contained in Signet letters appears to be in force for one year only, so that the search need not go back longer than one year and forty days; that is, the period during which the letters may have been in force, and the forty days allowed for recording after publication by execution against the lieges.

ADJUDICATION.

In the case of an adjudication, litigiosity commences immediately after citation of the debtor upon the summons; and as summonses of adjudication now pass the Signet without bills, or other similar warrants, there is no search by which to learn with certainty whether there is any risk of litigiosity. The list kept at the Signet Office of writs passing the Signet may or may not mention the party against whom an adjudication is being led, according as the summons shall be against one or more defenders, and the name of such party shall stand first in the list. A search there, therefore, is not to be trusted; and I doubt if for adjudications it is ever made.

Litigiosity, like the diligence of inhibition, even when complete, strikes only against voluntary deeds, not the necessary fulfilment of previous obligations. And *mora*, in the completion of the diligence, may take off the effect of the litigiosity. This is always, of course, a case of circumstances.

We now return to the proper clauses of the contract or minute of sale. After the stipulation relative to incumbrances, we have the seller's obligation to free the lands of all feu-duty, casualties, and public, parochial, and local burdens, taxes, and assessments; and care should be taken to see that all such burdens are duly discharged before the price is paid over.

If the lands are in non-entry, it may often be advisable to arrange that, in place of the seller literally fulfilling his legal obligation, by entering with the superior, and paying a composition, the purchaser shall do so; and that the seller and purchaser shall bear the burden of the entry in specified proportions.

When lands are in the natural possession of the proprietor at the time of the sale, it may often be of importance to make special stipulations, in the missives of sale, as to the mode of cropping them for the season immediately before the purchaser's entry. For example, if the purchaser buys in 1860, with entry at Martinmas 1861, the seller has right to reap the crop of 1861; and it may be necessary to arrange specifically as to the manner in which he is to labour and manure the lands, and otherwise deal with them. Special provision may also be

¹ See on this subject Bell's Law Dictionary, 'Litigiosity' and 'Search of Incumbrances.'

necessary, in some cases, for preventing undue cutting of woods, and other dilapidation, between the dates of the sale and of the purchaser's entry. And in cases where the title of the seller is to form the subject of judicial discussion, so that perhaps several years may elapse before it can be ascertained whether there has been a valid sale or not, arrangements will have to be made as to granting leases, presenting to churches, execution of necessary repairs or improvements, and on other points, during the period of the suspense.

The purchaser's part of the minute of sale consists of an obligation, on receiving a valid disposition, with relative progress of titles, and searches instructing that the lands are clear of incumbrances,—that is, on fulfilment of the seller's part of the contract,—to pay the price at a term specified, with penalty in case of failure, and interest at a specified rate during the not-payment. PAYMENT OF PRICE.

When the term of payment of the price is described as Whitsunday or Martinmas, the 15th May and 11th November are understood, being the money term-days; even though, by the custom of the country, tenants are not bound to remove, and possession cannot be given, till a later day.¹ TERM OF PAYMENT.

There being no particular 'legal' rate of interest, the contract should specify the rate to be paid. But, after the price becomes payable, and possession of the lands is given, interest is due *ex lege*, and without express stipulation.² RATE OF INTEREST.

We have seen that the purchaser may be exposed to great inconvenience by delay on the part of the seller to give him a title. On the other hand, it may be very important for the seller to provide against undue delay in payment of the price. A condition, that the bargain should be void if the price was not paid, or caution for it found, by a certain day, was allowed effect.³ But the condition need not be absolute. It should only secure to the seller the option of annulling the bargain in case of delay in payment. As has been already said, the seller should require actual payment, not merely caution or security for the price, in consideration of his disposing the lands; and, on the other hand, wherever the seller is not in a condition to give a valid and unincumbered title, the purchaser ought to consign the price in bank; otherwise he may be made liable in a higher rate of interest than he is receiving. In a case of very special circumstances, a purchaser had paid the price to the seller, the latter being the trustee in a sequestration, notwithstanding that there were undischarged burdens on the lands sold; and a succeeding trustee was found liable to clear off the burdens out of the bankrupt's estate.⁴ But the safe course is, neither to place the price within the power of the seller, by doing which the purchaser gives up the best compulsitor he has upon the seller for obtaining implement of his part of the contract, nor to retain the price in his

¹ Stewart, 21st Dec. 1811, F. C.

² Speira, 5th June 1827, 5 Sh. 764.

³ Young, 9th March 1785, M. 14,191.

⁴ Moir, 27th May 1830, 8 Sh. 823.

own (the purchaser's) hands, as by doing so he may incur loss of interest.

It is usual to bind the purchaser further to pay one-half of the expense of the disposition, including the fees of drawing and revising, and the stamp-duty. The contract of sale then contains a submission of all questions and disputes, regarding the meaning of its provisions or their implement, to an arbiter or arbiters in succession; and, this being the case of the submission of an ordinary dispute or question, the arbiter must be named, otherwise it will not be binding.

Then both parties bind themselves to fulfil their respective parts of the contract to each other, under a specified penalty in case of failure. And the contract concludes with consent to registration of the same, and of any decree-arbitral to follow on the submission which it contains, for preservation and execution, and testing-clause, in usual form.

ARTICLES OF ROUP.

The third form of the writings preliminary to a disposition consists of Articles of Roup by the seller, Minute of Roup and Sale in favour of the purchaser, and his obligation to fulfil the articles. This form is applicable to the case of lands being sold by auction to the highest bidder.

The articles commence with their title, which contains the description or specification of the lands, as it will be inserted in the disposition to the purchaser. All relative reservations, conditions, etc., may be inserted at the end of the description. But it is frequently more suitable, and specially when the lands are to be, or may be, exposed in lots, to insert these reservations, etc., in the clause obliging the seller to grant the disposition to the purchaser. The title specifies also who are the exposor or seller, and the place, day, and hour of the intended sale.

Article *first* bears that the lands are to be exposed to public voluntary roup, in one or more lots, as has been or may be afterwards arranged, and at a price or prices named, or to be named in the minutes annexed to the articles of roup, and on conditions specified or to be specified in such minutes. But, when the articles leave the price and other important particulars to be specified in minutes, the exposor, or some person duly authorized by him, must sign the minutes. The judge of the roup has power to sign the minutes of roup only; that is, the minutes declaring who is the purchaser in terms of the articles, or declaring that there has been no offer, etc. But the judge has no power, *quid* judge of the roup, to fix the price or the terms of the sale generally. The same article declares that the lands shall belong to the only or to the last and highest offerer.

The articles frequently say that the lands are to be exposed during the running of a half-hour sand-glass, or for a space of time to be ascertained by a watch placed upon the table; and that the highest bidder at the outrunning of the sand in the glass, or when 'time is up' according to the watch, is to be the purchaser. But if a competition is going on

it is the duty of the judge of the roup to lay the glass on its side, and prevent its running out, or to stop the watch,—so as to allow full scope for the competition.¹ A better form in this respect, and one which obviates all difficulties as to time, I think, is to say that the highest bidder shall, ‘after three’ or more ‘calls by the judge of the roup,’ be preferred to the purchase.

As a general rule, any solvent individual is allowed to bid for lands exposed to sale by public roup; and, should a party offer who is actually under diligence for small sums at the time, the exposor is entitled to call on the judge of the roup to reject his offer, and not allow him to compete.²

Article *second* specifies the amount by which each offer, if there are two or more, is to exceed the preceding, and binds the offerers, if required, to subscribe their offers.

Article *third* declares the term at which the purchaser is to enter to the lands, the place where he is to pay the price, the term when he is to pay, or it may be to consign the same in bank, and the term from which he is to have right to the rents. If the price is to be consigned in bank, and not actually paid to the seller, it is generally sufficient to appoint consignment to be made in one or other of the banks in Scotland, incorporated by Act of Parliament or Royal Charter. But more frequently the particular bank is specified, and when the sale takes place under a bond and disposition in security, framed in terms of the Heritable Securities Act of 1847,³ the provisions of sect. 8 of that Act must be kept in mind, viz, that the creditor, upon receipt of the price, shall consign the surplus which may remain after deducting the debt secured, with interest, expenses, etc., and after paying all previous incumbrances, and the expense of discharging the same, in one or other of the banks above referred to, in the joint names of the seller and purchaser, for behoof of the parties having best right thereto. And the particular bank, in which such consignment is to be made, is to be specified in the articles of roup. In this case, you will observe, it is not enough to provide for consignment in ‘one or other’ of the banks.

Article *fourth* usually binds the purchaser, if required, within a short specified period after the roup, to grant bond with a sufficient cautioner, or to give other security to the exposor’s satisfaction, for payment of the price. To which is sometimes added, when this matter is fully in the exposor’s power, an option to the purchaser of depositing the price, or a portion of it, in bank in the joint names of the seller and himself, by way of security of the due implement of the purchase.

Article *fifth* gives the exposor the option, in case of the highest bidder failing to give security as required, either to declare the sale void, and of new to expose the lands to sale, or to declare the lands to belong to the immediately preceding offerer, who, in such case, and on due inti-

¹ Burns, 27th Nov. 1807, M. App. voce Sale, No. 4.

² Menzies, 4th July 1840, 2 D. 1317.

³ 10 & 11 Vict. c. 50.

mation of the forfeiture of the purchase, and requisition to fulfil, shall be bound to implement his offer, as the highest bidder was bound for his offer,—and so on through all the offerers, till the articles be fulfilled.

In case of failure to find satisfactory security within the time limited, the highest bidder, under articles of roup with a clause as to security expressed as above, forfeits his purchase.¹ But, although a certain discretion is vested in the exposor as to the sufficiency of the cautioner or other security offered, he has not an absolute or arbitrary discretion. He is bound to exercise his discretion *secundum bonum et æquum*. It is, however, a good objection that the cautioner offered is not subject to the jurisdiction of the Courts of Scotland.²

Intimation to the second offerer, upon failure of the first, with requisition to fulfil the purchase, gives the party so called on right to reciprocal performance, which cannot be excluded by any equitable consideration for the party through whose failure the purchase has devolved on the second offerer.³

But the second highest offerer is not entitled to insist on being preferred, although the highest shall inadvertently allow the stipulated time to elapse without finding caution. It is in the discretion of the seller to foreclose the highest offerer or not.⁴ The highest offerer, however, must be a *bond fide* third party. And if the price was raised by collusive proceedings,—if a party, technically known as a ‘white bonnet,’ has raised the price by fictitious bidding,—the next offerer is free.⁵ This principle has been applied to the case of the residuary legatee, under a testamentary trust, bidding for lands exposed to sale by the trustees, and in the price of which he had an interest. The whole biddings by the legatee were annulled, and the lands declared to fall to the offerer with whom the legatee had competed, at the price offered by that offerer before the competition on the part of the legatee commenced.⁶ The same article imposes a penalty on the highest offerer in case of his failure to find security; and such penalty, when stipulated, is the maximum of damages claimable for non-implement of an offer made at a public sale.⁷

By article *sixth*, the exposor binds himself, on payment of the price, or in certain cases on consignment thereof in bank, to grant the purchaser a disposition of the lands, with the usual clauses, which have been fully considered in connexion with the contract of sale. By the same article it is usual to express whether searches for incumbrances are to be furnished by the exposor or not, and to say by whom the expense of the disposition is to be paid.

Article *seventh* provides for the liability of the seller and purchaser, respectively, for the feu-duty and casualties, and public and parochial burdens. If any burdens, applicable to a period both before and after

¹ Menzies' case.

² Davidson, 19th Jan. 1815, F. C.

³ Hannay, 15th July 1788, M. 14,194.

⁴ Walker, 10th Feb. 1787, M. 14,193.

⁵ Anderson, 16th Dec. 1814, F. C.

⁶ Faulds, 25th Feb. 1859, 21 D. 587.

⁷ Johnstone's Trustees, 19th Jan. 1819, F. C.

the term of the purchaser's entry, are payable in one slump sum, or if the annual burdens are payable *in cumulo* for the lands sold and for other lands retained, arrangements for apportionment or division of the respective amounts should be introduced here.

Article *eighth* makes provision as to the delivery or exhibition of the title-deeds, and declares that offerers are understood to have satisfied themselves respecting their validity before the roup, and shall not afterwards be entitled to require that any other titles shall be made up at the expense of the exposor. The meaning and operation of this clause has already been explained in connexion with the contract of sale. If the lands are in non-entry, and the seller is not to enter with the superior, it is well to make an express stipulation to that effect.

In case the lands are sold in virtue of powers in an Act of Parliament, or under a bond and disposition in security; or, as in the case of sales by royal burghs, if the sale is subject to regulations imposed by Statute; the declaration, that offerers are understood to have satisfied themselves, ought to be extended to the sufficiency of the notices and advertisements, and other preliminary proceedings required by the Statute, or bond, if any, with a view to the sale. And the preliminary proceedings required in the case of such sales call for most minute attention and examination. The sale is allowed only on condition of these proceedings being duly observed. A private Act of Parliament authorized a sale after giving notice by advertisement in the Gazette, and each of three newspapers, weekly for three months preceding the day of the roup, and subject to the approval of the Court of Session. The notice in one newspaper was omitted for one week; and the Court refused to approve of the sale, although a previous intended sale, when no offerer appeared, had been duly advertised.¹ A similar judgment was pronounced where the sale took place upon an adjournment, with alteration of several of the conditions, and where the advertisements, though regular and complete as to the original exposure, had been inserted only for a few weeks immediately before the adjournment.² The procedure directed to be followed by such Acts is often very cumbrous and unmanageable, and it need not now be adopted;—the Entail Amendment Act of 1853 having, by sect. 10, given power to the parties entitled by the special Act to sell, to apply to the Court for authority to do so in the manner prescribed by the Entail Amendment Act of 1848; and the Court are authorized to grant power to sell on such reasonable advertisement, and on such conditions, as they shall think fit. On the principle applied in the cases of Hope and Melville, a sale of lands, in virtue of powers in a bond and disposition in security, was reduced, where the bond stipulated for 'previous advertisement in the Kelso and Berwick newspapers' 'for at least one month weekly,' and where there was a period of seven days (in the course of the month) without any advertisement, and no week in

¹ Hope, 26th Jan. 1833, 11 Sh. 324.

² Melville, 28th Jan. 1854, 16 D. 419.

which there were advertisements in both Berwick and Kelso newspapers.¹

Article *ninth* declares that offerers are understood to have satisfied themselves before the roup as to the rental, value, and extent of the lands, and as to the state of the teinds and the amount of the feu-duties and public and parochial burdens, and as to all other particulars, and shall not be entitled to demand any deduction from the price on account of any misunderstanding, error, or alleged deficiency in rental or extent, or under-statement of feu-duty or other burdens, or any defect of the titles, or on any other account whatever. But even a very comprehensive and stringent clause to the above effect, contained in articles of roup, will not protect a sale, though *bond fide* made and completed on both sides in supposed accordance with the articles, if there has been an essential and material error as to the identity of the subjects sold. A piece of building-ground, situated near Glasgow, with the houses erected thereon, was so sold; the sellers granting warrandice from fact and deed only. The price was paid to the sellers, and the subjects conveyed to the purchaser, who had entered with his superior. It was then ascertained and admitted that a third party (named Imrie) had a preferable right to a considerable portion of the ground and houses thereon; and the Court reduced the sale in respect of the error.² Lord Jerviswoode, in his note in this case, says, 'The Lord Ordinary thinks the articles of roup insufficient to cover such a case, and he comes to this conclusion on the ground that where there is a flaw which strikes at the contract itself, and which would suffice to annul it, nothing short of a positive declaration that the purchaser shall be held to have no remedy in such a case can bar his right to restoration against it. It is not, in the view which the Lord Ordinary takes of the matter, material to consider whether the whole or only a part of the subject be affected by the flaw, if the part so affected be truly a substantial part of the subject which forms the object of the contract of sale.' And, 'it cannot, it is thought, be disputed, that if the terms of the articles now in question be sufficient to bar the present challenge, they must have been equally effectual so to do, had it turned out that the whole subject was embraced in Imrie's title, and that the purchaser had truly bought nothing whatever excepting a progress of titles. The question here, as the Lord Ordinary thinks, turns upon the matter of fact as to whether or not the pursuer has got the subject for which he contracted. If he has, there is an end of the case. If he has got only a portion of it, he has got something different from that for which he contracted; and he is therefore entitled to be free. In this view of the case, it is not one to which the clause of warrandice is applicable. If there be a sale, then the defenders may plead the limitation of their liability under that clause. If there be no sale, there is nothing to which the clause can apply.'

¹ Nisbet, 12th March, 1864, 2 Macph. 863.

² Hamilton, 12th June 1861, 23 D. 1033.

The Lord President M'Neill says, 'As to the purchaser satisfying himself as to the extent of the subject, I think that if the measurement had turned out to be thirty-four ells instead of thirty-five ells, as he may have supposed it to be, or if there had been some such difference between the actual and supposed extent, the articles of roup would have covered a case of that kind. But the question before us is not as to an error in mensuration, but as to the identity of the subject.'

The *tenth* article contains a reference to arbiters named, of all questions concerning the import or meaning of the articles, or the implement thereof. A reference, in these terms, is sufficient to embrace a question as to the right of the exposor to the lands, with which the articles stipulated that the purchaser was understood to be satisfied before the sale.¹

The *eleventh* article names the judge of the roup, with power to him to determine all questions which may occur at the roup, and to adjourn the sale, and to prefer the highest offerer, in terms of the articles. To this clause there is sometimes added a power by the exposor to a person named to act for him in connexion with the roup, and to sign minutes of exposure and roup, and relative papers.

Lastly, There is a provision that the exposor by signing the articles, and each offerer by subscribing his offer, shall be bound to fulfil the articles to each other, under a specified penalty; with clause of registration, applicable not merely to the articles, but to the offers, minutes, and enactments of roup, and any decree-arbitral which shall be pronounced under the submission contained in the articles.

The procedure at the roup, with the forms of offers, minutes of roup and sale, or of adjournment, minutes of re-exposure, etc., will be found in the Style Book.²

CHAPTER III.

I WILL now proceed to the examination of the writings, following on the disposition by the vassal or proprietor duly infeft to a purchaser, and by which the transfer to the purchaser is completed, and the lands are fully vested in him, as substituted in place of the seller. The dispositive, as you will remember, is the ruling clause of the disposition, as to the destination to heirs, and the subjects conveyed; but in what is now before us, and with reference to the completion of the purchaser's title, we have to look to the leading executive clauses, viz., —before the Titles to Land Act of 1858 came into operation,—the

COMPLETION OF
PURCHASER'S
TITLE.

¹ Watt & Anderson, 6th March 1849, 11 D. 970.

² Juridical Styles, vol. i. p. 90.

obligation to infeft, procuratory of resignation, and precept of sasine ; these being, at the period in question, the warrants of the writings which were required to operate and instruct the completion of the purchaser's right. Since the Act of 1858 came into operation, the obligation to infeft and precept of sasine can be, and usually are, dispensed with.

In the disposition which we examined, as framed before the Titles Act of 1858 came into operation, there was an obligation to infeft by alternative manners of holding ; one of the seller (*de me*), the other from the seller of his superior (*a me de superiore meo*) ; and the mode of infeftment applicable to the latter alternative was by resignation or confirmation or both, the one without prejudice of the other. And I think it will be convenient to take up the forms in which charters were framed before the Act came into operation, as a subject by itself ; and afterwards to explain the variations thereon, or new mode.

By CONFIRMATION.

And, in reference to the older mode, I will consider, first, the case of infeftment by confirmation, as being the more usual ; though undoubtedly that by resignation is more strictly in accordance with feudal rules and notions. The first step in order to infeftment by confirmation, in the older form, was to expedite an instrument of sasine in favour of the purchaser, in virtue of the precept of sasine contained in the disposition in his favour. The manner of holding in the disposition being alternative, and the precept being indefinite, this sasine operated at once and immediately a complete and independent title to the lands—that is, to the property thereof—holden of the disponer as superior, in terms of the obligation to infeft *de me*. At the same time, the sasine did not fully evacuate the right of the disponer. It was, as yet, only a subaltern infeftment holden of him ; he retaining the superiority over it, and remaining the vassal of his own superior, very much as if he had granted to the purchaser an ordinary blench-charter. But the infeftment was alternative, to be holden either of the disponer or of his superior. It could not, indeed, be holden of his superior without such superior's formal interposition ; and such interposition was only to be given effectively by confirmation of the infeftment. But, as soon as the superior's confirmation was formally granted, the infeftment was holden of him ; the purchaser was fully entered and substituted as vassal, in the room and place of the disponer ; and the subaltern infeftment holden of the disponer (*de me*) was evacuated. The superior's consent was given by a charter of confirmation ; and the purchaser's infeftment, holden of the superior by confirmation, was thus accomplished by means of the disposition, sasine thereon, and charter of confirmation from the superior. The purchaser's infeftment, to be holden of the superior by confirmation, was completed in precisely the same way in the case of his having a disposition with obligation to infeft *a me* only.

The distinction between the two cases lies in this,—that the sasine on the disposition, with the *a me* holding only, gave, until confirmed, no

security against subsequent grants from the disponer. It was a sasine to be holden of the disponer's superior only, and requiring such superior's approval and confirmation to give it efficacy against such subsequent grants; whereas the sasine on the disposition, with the *a me vel de me* holding and the indefinite precept, was immediately, and from the first, good and valid as a sasine of the lands or property thereof, to be holden of the disponer, and preferable, as regarded the lands or property, to sasines on subsequent grants by him; and, on being afterwards confirmed, it then became a sasine of the whole of the disponer's interest, property and mid-superiority, holden of the disponer's superior, and no longer confined to the lands or property holden of the disponer.

I will now examine the clauses of the Charter of Confirmation.

CLAUSES OF
CHARTER OF
CONFIRMATION.

The charter describes the granter as 'immediate lawful superior of the lands.' Sometimes it bears to be granted in consideration of the payment of composition or entry-money, the receipt of which it acknowledges; but it is more common, in framing such charters, not to express any inductive cause. In fact, the entry-money, though payable on delivery of the charter, is not the cause of granting, as the law now stands. The charter is granted in compliance with a legal obligation, which is the true cause for it.

Immediately after the description of the granter, or after the statement of the payment of composition, if such is inserted, we have the clause of confirmation, which is the essential and operative clause of the charter.

We have then the *tenendas*, *reddendo*, and registration clauses,—likewise, reservation of byegone and current feu-duties, where the lands are held in feu-farm,—and the clause '*salvo jure meo et cujuslibet*,' whether the lands are held in feu or blench; all of which I shall refer to when we are examining the charter of resignation,—the structure and objects of these clauses, in the two charters respectively, being identical.

But, speaking in a strictly feudal sense, the only operative clause of the charter under consideration is the confirmation; which, with the testing-clause, and nothing else, would give the deed full efficacy in completing the new proprietor's entry and infeftment by confirmation. As regards the terms of that clause, the object of all charters of confirmation is to complete the entry of the new proprietor, and his substitution in the place of the last vassal; and what is required, in principle, for that purpose, is that the superior shall interpose his confirmation to the deed, or deeds, or series of deeds, by which the lands have been conveyed from the last vassal to the new proprietor, and by which the right of the latter is made real. The principle is, that every infeftment or real right must be made an infeftment or real right by or from the superior. The original infeftment or real right flowed directly from the superior or his predecessors in the superiority; and he does not confirm it, because he or his predecessors granted it; and he cannot, by confirmation or otherwise, make it more an infeftment or real right

holden of him as superior than it is already ; and, for the same reason, he does not confirm infeftments or real rights following on charters of resignation, or precepts of *clare constat*, by him or his predecessors, nor those which he or they have previously confirmed. As to all of these, the object of confirmation is already attained.

By the clause of confirmation in the charter as in use to be framed before the passing of the Conveyancing Acts of 1847, and as still occasionally framed, the superior confirms to the new proprietor the lands, together with the disposition, or series of dispositions, connecting the new proprietor with the last vassal, and the sasine, or sasines, or notarial instruments thereon, if any. Or, according to other forms, he confirms simply the disposition, or series of dispositions, and sasine, or sasines, or notarial instruments, containing the lands, without making the confirmation of the lands a separate and independent clause of the deed. In this last form the description of the lands is introduced in narrating or confirming the disposition by the last vassal ; and when a series of dispositions, with obligations to infeft *a me*, or *a me vel de me*, and the sasines or notarial instruments thereon, are confirmed in one charter, the effect of the confirmation is to make them all infeftments or real rights holden of the superior, just as if he had, on the occasion of each transmission, granted a separate confirmation of the disposition and sasine or notarial instrument. The one charter of confirmation, applicable to the whole infeftments or real rights, is equivalent to a separate charter of confirmation applicable to each.

The important change of form introduced, or at least authorized, by the Transference of Lands Act of 1847,¹ consists in this,—that confirmation by the superior of the lands themselves, and the instrument of sasine therein in favour of the new proprietor, is declared, by sect. 7, to be equivalent to confirmation, as regards the lands confirmed, of the whole dispositions and instruments of sasine, and all other deeds and instruments necessary to be confirmed in order to complete the proprietor's investiture as immediate vassal, although such deeds and instruments are not enumerated in the charter. In all other respects the older and more modern forms of the charter of confirmation are the same ; and you will observe that the alteration of form allowed by the Act of 1847 does not interfere with the principle of the operation of the charter. The relative enactment gives to the form thereby authorized the full effect of the older form. It merely operates abbreviation, by making the enumeration of writs unnecessary ; and it has the further great advantage of diminishing the risk of error, so apt to arise in describing the particulars of a series of titles. In the statutory form, the charter which operates the confirmation of several infeftments differs in no respect from that which is applicable to only one.

Confirmations by superiors have, in modern practice, been invariably granted *after* taking the sasine on the disposition or other writ con-

¹ 10 & 11 Vict. c. 48, Schedule (D.)

firmed. And the form authorized by the Act of 1847 is available only to parties who have expedite instruments of sasine or notarial instruments upon the disposition in their favour, or have registered such disposition. But, on principle, confirmation ought to be at least as effectual *before* as *after* sasine is passed, or a real right otherwise obtained. The object of the confirmation is, by interposing the superior's approval in the proper technical form, to give efficacy to the infeftment or real right in the lands, as an infeftment or real right to be holden of the superior; and it would seem that, if the superior said, 'I confirm this disposition as a warrant for sasine or for a real right to be holden of me,' this ought to make the sasine following on the confirmed disposition, or the real right obtained in virtue thereof, to all intents, a sasine or real right holden of him, as effectually as when he says, 'I confirm this disposition, with the instrument of sasine thereon, or real right obtained in virtue thereof, as an investiture to be holden of me.' And there is good reason to suppose that, in early practice,—probably until stamp-duties were imposed on charters of confirmation,—the disposition or other warrant frequently had confirmation by the superior indorsed before sasine was passed on it. But the efficacy of the confirmation before infeftment has been seriously questioned; and, practically, the question is now of slight importance. I have referred to it, only because it tends to elucidate the principles applicable to the mode of completing a new proprietor's entry by confirmation.

When a charter of confirmation is duly granted, it operates *retro*, to the effect of making the infeftment or real right confirmed, an infeftment or real right holden of the granter of the charter as superior, from the date of completion of the infeftment or real right; and that although the party whose infeftment or real right is confirmed shall have died before the confirmation.¹ But there must be no mid-impediment intervening. If two parties, onerously and *bond fide*, acquire the same lands, the one who first obtains infeftment, or a real right, to be holden of the disponer (*de me*), is preferable, so far as regards the fee of property. As regards the infeftment, or real right, to be holden of the disponer's superior (*a me*), the one who first obtains his infeftment, or real right, duly confirmed by the superior, is preferable to the other; though it may happen that the first confirmation applies to the second infeftment or real right.² The first confirmation, therefore (assuming that the party is an onerous *bond fide* purchaser), operates a mid-impediment to the validity of the second. The superior has already confirmed an infeftment or real right in the lands, for an onerous cause, to be holden of himself; and he cannot effectively thereafter confirm a similar infeftment or real right in favour of another.³ No mid-impediment, however, is created by a disposition with obligation to infeft *a me* only, or *a me vel de me*, fol-

EFFECT OF
CONFIRMATION.

¹ Macdowall, 19th Jan. 1793, M. 8807; Lockhart, 16th Nov. 1837, 16 Sh. 76.

² 1578, c. 66; Erskine, ii. 7. 14.

³ See on this point Gardner, 6th Dec. 1839, 2 D. 185; reversed 3d March 1843, 2 Bell's App. 129.

lowed by registration, or sasine, or notarial instrument, not confirmed. The superior has not interposed in that case in any way, and he is free to confirm a disposition registered, or followed by sasine, or notarial instrument, in favour of another. Neither is a mid-impediment created by the superior granting a precept of *clare constat* to the heir of the last vassal, although it includes the lands of which a charter of confirmation is desired by the disponent of the last vassal. The disponent can at any time supersede the title in the person of the last vassal's heir as effectually as he could have superseded that of the last vassal himself. The procuratory by the last vassal is as effectual after the granter's death as before; and, as to the lands therein contained, the heir is *eadem persona cum defuncto*.¹

Until the passing of the Conveyancing Acts of 1847, it was not incumbent on the superior to grant a charter of confirmation to the disponent of his vassal, although the practice of doing so had become universal. But by the Transference of Lands Act of 1847² superiors are bound to grant charters of confirmation to any person infeft in lands held of them upon a disposition, or other deed of conveyance, granted by the person last entered and infeft, or by a person whose own title was capable of being confirmed according to the then existing law and practice, provided the disposition contained either an obligation to infeft *a me*, or an obligation to infeft *a me vel de me*,—and on other conditions corresponding with those applicable to the superior's obligation to grant entries by resignation under the Act 20 Geo. II. cap. 50.

ANCIENT USE OF
CHARTER OF
CONFIRMATION.

Before proceeding to examine the charter of resignation, I wish shortly to notice the distinction between the charter of confirmation as now in use, and the charter called by the same name frequently met with in the earlier history of Scotch land rights. Alienation is now absolutely free of all restraints at the instance of the superior, whose confirmation must be given, when required by a person entitled to claim it, on payment of the legal casualties; and the effect of such confirmation is to validate a transmission and infeftment or real right in lands to be holden of the granter of the confirmation as superior, and thus to introduce a new vassal to the fee in place of the old. But in former times, when alienation by a vassal, to be holden directly of his superior, was not allowed by law, the estate of any vassal who attempted it was liable to recognition,—that is, to be forfeited to the superior. In that state of the law, sub-vassals were exposed to serious risks; because, when the right of the immediate vassal was forfeited to his superior, the subaltern rights granted by such vassal were in like manner forfeited, if the superior had not acknowledged them. It was thus not unusual for the sub-vassals to obtain charters of confirmation from the superior of their superior,—not in order to make them hold directly of that superior—as is the object of confirmation now,—but that they might not be

¹ Fullarton, 22d Nov. 1833, 12 Sh. 117.

² 10 & 11 Vict. c. 48, s. 6.

involved in the forfeiture of their immediate superior in case it should happen.

In strict law the same risk attends forfeiture now as formerly; and if forfeiture happens, the right of the sub-vassal falls, along with that of the immediate vassal, to the superior. But forfeitures may be said to be almost unknown; and, accordingly, charters of confirmation of the class now referred to have long been obsolete.¹

I now notice the infeftment of the new proprietor by resignation; RESIGNATION. still confining myself to the mode of procedure in use before the Titles to Land Act of 1858 came into operation.

The executive clauses of the disposition, in order to such infeftment, are the obligation to infeft and the procuratory of resignation; and though the disposition may contain a precept of sasine, and the obligation to infeft may happen to be alternative, *a me vel de me*, no use can be made of the precept; nor is the alternative holding, *de me*, to any extent available or necessary. The infeftment by resignation is not the act of the last vassal, or proprietor, confirmed by the superior. It is, and must be, exclusively the direct act of the superior himself. The procuratory of resignation, as we have seen, is a mandate from the last vassal, or proprietor, for resigning or giving back the lands to the superior, in order that he may dispoise them to the new proprietor. The lands are given back accordingly; and the superior thereupon dispoises them to the new proprietor by a Charter of Resignation, so called because it follows on the last vassal's resignation.

This charter, like the charter of confirmation, may, or may not, contain an inductive clause. When there is such clause, it will usually be in all respects similar to the corresponding clause in the charter of confirmation. CLAUSES OF CHARTER OF RESIGNATION.

The charter of resignation contains next a dispositive clause, by which the superior gives, grants, and dispoises, and perpetually confirms to the new owner, and his heirs and assignees, or otherwise,—according to the destination contained in the disposition, or other warrant, and procuratory or clause of resignation therein contained,—the lands which have been resigned.

The words employed in the dispositive clause of the charter, you will observe, are 'give, grant, and dispoise;' the charter of resignation not representing an onerous transaction like the original charter, which, in the corresponding clause, uses the words 'sell and dispoise.' But still, the words used assume that the superior is for the time vested in the lands; which is in accordance with the feudal principle, that the fee is in his hands by the resignation or giving back thereof to him on the part of the last vassal. Any reservations or conditions contained in the original charter ought to be repeated, or distinctly referred to, in every

¹They are referred to in the Supplement to Spottiswoode (p. 207), as not in disuse in 1734.

charter of resignation or other charter by progress. But the omission so to repeat or refer to reservations or conditions in charters by progress, though continued for forty years and upwards, does not extinguish the reservations or annul the conditions. The superior has right (if charters by progress only have been granted) to recur to the original feu-charter, as showing the measure and terms of the feu, and on giving a new entry is entitled to insert reservations or conditions in terms of the original feu-right, or to refer to such reservations or conditions as contained in the feu-right, just as if they had never been omitted from any of the intermediate charters.¹

The description of the lands in the charter of resignation cannot go beyond the terms of the disposition which is its warrant, and procuratory therein contained. In early times, frauds were practised by vassals granting procuratories of resignation and obtaining charters in their own favour with enlarged boundaries. To prevent that, the Act 1592, cap. 138, declared that the description in such charters, though more comprehensive than in the original charter, would not affect the marches of any other person. A different result may follow from a charter of resignation by the superior in favour of a third party on the last vassal's resignation. Possession upon such charter, with recorded sasine thereon, during the period of the long prescription, would give to such third party an effectual right to all the lands within the boundaries specified in the charter.²

QUÆQUIDEM
CLAUSE.

We have next the *quæquidem* clause, so called from the initial word of the clause in the charter, when written in Latin. This is an explanatory clause, its object being to show the *modus vacandi*,—how it is, and for what purpose, that the lands which were formerly given out by the superior to a vassal are again in the superior's hands,—the authority, in short, on which the superior again disposes the lands. Until the Conveyancing Acts of 1847 came into operation, this clause described, *inter alia*, the process of resignation in the superior's hands. But that form was altered, and the clause made to bear simply that the lands formerly pertained heritably (that is, by completed infeftment) to the last vassal, holden by him of the granter of the charter of resignation, as his superior, and were resigned by him into the superior's hands by virtue of the clause or procuratory of resignation contained in the disposition of the lands granted by the last vassal to the new proprietor.

The procuratory expresses the purpose of the resignation, viz., that new infeftment might be granted by the superior in favour of the new proprietor. The purpose of the resignation, which used formerly to be expressed in the *quæquidem* clause of the charter, is not so in the form of charter introduced by the Acts of 1847. If the terms of the original feu-right are to be altered by the parties in any respect, this ought to be done by a clause of *novodamus*, which will be introduced in the charter of resignation after the *quæquidem*. A vassal's estate of property

¹ Hutton, 11th Nov. 1863, 2 Macph. 79.

² Tillicoultry, 5th Dec. 1701, M. 12,743.

cannot be enlarged by the mere terms of charters by progress without a *novodamus*. A charter of resignation, or other charter by progress, operates merely a renewal of the existing investiture; and no omission of reservation, condition, or obligation in such charter would operate prejudicially either to the superior or vassal. A clause or charter of *novodamus*, however, partakes so far of an original charter as to be the proper warrant by which at once to discharge or modify any of the reservations or conditions of the original right, or to change the holding or the *reddendo* therein expressed. A clause or charter of *novodamus* is, in fact, the appropriate medium by which to express and complete a change in the prior contract between the superior and vassal in any respect.

After the *quæquidem* clause, and the *novodamus*, if any, we have the clauses of *tenendas* and *reddendo*, which (in case of there being no *novodamus*) ought to be in strict conformity with the corresponding clauses of the original charter, either by reference or in express terms. But even if any of the provisions of the original charter, forming proper parts of the obligations thereby undertaken, *hinc inde*, are omitted, they will be held as repeated in the charter of resignation, unless there be an express agreement to the contrary. And such agreement, where there is any, should be carried out, not by a charter of resignation merely, but by a charter of *novodamus*. Notwithstanding the omission, in a series of charters by progress, of an obligation by the superior to relieve the vassal of all public burdens contained in the original feu-right, but which had never been imported into the records, a singular successor in the superiority was held bound to insert such obligation in a renewal of the investiture about to be granted by him.¹

There is no warrandice in charters of resignation; for in these the superior interposes at the request of others, and does not undertake or incur any liability by doing so. Of course, however, if a new proprietor obtains such charter, and pays composition for his entry to one who is found to have had no right to the superiority, whereby the charter falls to the ground, the grantee of the charter is entitled to recover the composition so paid.

After the *reddendo*, we have the consent to registration for preservation, which, in terms of the Act 1693, sect. 35, can be in the Books of Council and Session only.

We have then, in the form of charter still under consideration, a precept of sasine in the longer or shorter form, according as the charter may have been granted before or after the Act of 1845 came into operation.

At the end of the precept, in either form, there is introduced, where the holding is in feu-farm, a special reservation to the superior of bygone and current feu-duties, so far as not paid; and in all cases the clause '*salvo jure meo et cujuslibet*,'—meaning that the charter, being granted in compliance with a legal obligation upon the superior, and without war-

¹ Hope, 20th Feb. 1864, 2 Macph. 670.

randice against him, is to affect no lawful right in the superior or any one else, and is in fact granted and accepted *periculo petentis*. The delivery of the charter without reservation of the feu-duties would import a discharge of all prior casualties and duties; and hence the importance of the special reservation.¹ But the granting of such charters does not preclude the superior from the benefit of inhibition, previously used by him against the granter of the disposition on which the charter proceeds.² And, if there should emerge to the superior a right to the property, preferable to that of the party to whom he has granted the charter of resignation, the granting of the charter is not to preclude him from vindicating that right. But, when there is any opposing right existing or likely to arise in the superior's person, it should be made the subject of a special reservation; or, if the vassal will not accept the charter with such reservation, the superior should only grant it on a charge of horning at the new proprietor's instance upon letters of horning against superiors. There should also be a formal protest that the charter shall not prejudice the superior's right.

By the Titles Act of 1860, sect. 39, charters of resignation operate (as charters of confirmation do by the Act of 1847) as a confirmation of the whole deeds and instruments necessary to be confirmed in order to complete the investiture of the party in whose favour such charter may be or may have been granted. The simple charter of resignation, therefore, supersedes the necessity of the charter of resignation and confirmation combined, which we shall presently notice; and by this enactment the omission to grant confirmation of prior writs along with a charter of resignation, which under our former law would have been fatal to a title, is now rendered harmless. The Act of 1860 makes the same provision as to charters of adjudication or sale.

By the charter of resignation, as already observed, the superior disposes the lands as if he were again vested in them. But he is not invested by the resignation, except for the sole purpose of giving out the lands to the new proprietor; nor is the last vassal divested by the mere resignation in the superior's hands, or even by the grant from the superior to the new proprietor. The new proprietor requires infeftment, or its equivalent, in order to divest the last vassal, and invest himself. And, were the last vassal to grant a disposition in favour of another party, with an *a me vel de me* holding, or with a *de me* holding, on which infeftment or its equivalent should follow, before infeftment or its equivalent had followed in favour of the first disponee in virtue of the charter of resignation,—the first infeftment or its equivalent in favour of the second disponee, as it constitutes a complete and independent right, would prevail over the second infeftment or its equivalent in favour of the first disponee. It has even been decided that a party who

¹ Cassillis, Feb. 1682, M. 6414; Gibson, 2d Feb. 1739, M. 6500; Tailors of Glasgow, 11th June 1851, 13 D. 1073.

² Lord Forbes, 28th November 1673, M. 6517.

held a disposition from the last vassal, with *a me vel de me* holding, and relative procuratory and precept, and who had obtained a charter of resignation on the procuratory, could afterwards validly execute the precept in his disposition. No infeftment having passed on the charter of resignation, the fee was still in the last vassal, and his precept therefore was still available for infeftment in favour of his disponee. And the lands are actually in non-entry,—that is, without a vassal,—in case of the last vassal's death, until the charter of resignation in favour of his disponee is followed by sasine or its equivalent.¹ The superior, however, is subjected, by the Act 1540, cap. 105, to severe penalties, in case of his accepting successive resignations from the same vassal of the same lands in favour of different parties.

The new proprietor's title is completed, and he becomes the vassal, by expeding sasine on the charter, or by registration of the charter in the register of sasines,—proceedings as to which no observation appears to be called for. But, as the lands remain in non-entry until the charter is followed by sasine or its equivalent, and the superior's casualties are liable to be disappointed by assignation of the charter and precept, before sasine or its equivalent, I hold that the superior is entitled to require the charter to be followed by sasine or its equivalent, in favour or on behalf of the immediate grantee, and to provide against the risk of assignation to a third party. It is of importance, however, to see that the superior's own title to the superiority, on which depends his right to receive the last vassal's resignation, and to grant the new title, is complete. It is true that if the superior, at any time of his life, completes a valid title to the superiority, such title will operate by accretion to validate the resignation and charter; just as if it had been good and valid from the first.² But in case the superior has no infeftment or its equivalent at the time of granting the charter, and shall die without obtaining infeftment or its equivalent,—or shall assign his personal right to a third party, who expedes infeftment or registration,—accretion will not take place.³ And when the charter is granted by trustees, having only a personal right, and no one of whom is ever infeft, the infeftment of additional trustees, assumed by them, will not validate the charter of the original trustees.⁴

It is, however, sufficient for the safety of the vassal that the superior's right is undoubted, and his infeftment or title complete, as appearing from the record, and unchallenged at the time; although it may be exceptionable, as in a question with parties having a contingent interest; for example, substitute-heirs of entail. The vassal has no title to scrutinize the warrants of the superior's title.⁵ And the vassal cannot except to a party's title, which he or his ancestor has already recognised by accepting an entry from such party as superior.⁶

¹ Purves, 14th Nov. 1677, M. 6890.

² Innes, 20th Nov. 1844, 7 D. 141.

³ Norton, 6th July 1813, F. C.

⁴ Martin, 3d Feb. 1841, 3 D. 485.

⁵ Gibson-Craig, 10th July 1838, 16 Sh. 1332.

⁶ *Ibid.*

**DISTINCTIVE
PECULIARITIES
OF RESIGNATION
AND CONFIRMA-
TION.**

It may be useful, before closing the subject of the completion of titles by resignation and confirmation, according to the older form, to contrast the peculiarities of each of these modes.

In the case of the resignation, the lands are given back by the old vassal to the superior, who thereupon grants a charter in favour of the new proprietor, and he then obtains infeftment, in virtue of the superior's warrant, or registers that warrant. In the case of confirmation, there is no giving back to the superior. The old vassal disposes to the new vassal, and grants him the warrant for his infeftment and registration. Sasine or registration then takes place; whereupon the superior interposes his confirmation. The title by resignation and sasine, or its equivalent registration, proceeds directly from the superior, as authorized by the last vassal. By confirmation, it proceeds from the last vassal, and is sanctioned by the superior. In the resignation, the connexion between the old and new vassals is explained in the *quæquidem* clause, which expressly narrates the act and deed of the last vassal as its warrant. In the confirmation, the connexion is brought out in the enumeration of the deeds confirmed; or (if all are not enumerated, as in the form introduced by the Act of 1847) by the exhibition of them all to the superior; and the writs enumerated or exhibited must begin with the disposition from the last vassal. It is not usual, however, to say expressly that he is the last vassal. That fact is left to inference; so that the charter of confirmation, by itself, does not plainly show the links of connexion as the resignation does. Again, by the resignation, the last vassal is not denuded, nor is the new vassal invested, until the charter is followed by sasine or registration. In the meantime, that is, before the charter is followed by sasine or registration, the last vassal may alienate to another. And, in case of his death, the lands are in non-entry, notwithstanding that the superior has granted the charter. But the confirmation—following after the new vassal has been infeft or registered—completes the divestiture of the old, and investiture of the new vassal; and, after delivery of the charter, the liability to casualties depends on the life of the new, not of the old vassal.

A title consisting of a charter of resignation and sasine, or such charter if duly registered, is a good foundation for the plea of prescription; whereas, in the case of confirmation, the disposition from the last vassal is a necessary part of the title in addition. But, as Mr. Duff says,³ 'it must be conceded, that the security obtained by immediate infeftment on the indefinite precept in the disposition far more than counterbalances any advantage which may be supposed to attend the greater simplicity or feudal propriety of the form by resignation; whence it has resulted, that the entry by resignation is comparatively rare in practice.' Probably, the more influential cause leading to this result, in the case of parties holding a disposition with *a me vel de me* holding, is that, when a charter is taken from the superior, the compo-

³ Duff's Feudal Conveyancing, p. 233.

sition due by a singular successor is exigible. If the parties complete their title by resignation, they are liable to pay composition at once ; whereas, if by confirmation, the payment stands over until they are called on to take the charter ; and, in the meantime, they have a safe title to the property of the lands, in virtue of their infeftment or registration, to be holden *de me*. But, from whatever cause, feudal usages have, in this as in many other instances, given way before substantial advantages.

I will now notice the combined Charter of Resignation and Confirmation, which, in past practice, is met with in two classes of circumstances altogether different from each other.

CHARTER OF
RESIGNATION
AND CONFIRMA-
TION.

And first, you will recollect that, in dispositions such as we have been considering, the obligation to infeft, or the disposition of the lands, to be holden *a me*, concludes with the words, ‘ and that either by resignation or confirmation, or both, the one without prejudice of the other.’ This has been held to sanction a charter of resignation and confirmation ; confirming a disposition by the last vassal to the new vassal, with the sasine following on the precept therein contained ; and which confirmation would, by itself, complete the new vassal’s title. But the charter in question not only confirms the disposition by the last vassal, and sasine in favour of the new vassal, but, in virtue of resignation on the last vassal’s procuratory contained in the same disposition, disposes the lands to the new vassal. At least it has been held that a charter of resignation obtained in such circumstances, in conjunction with a confirmation, was good and valid.¹ It was argued, in the cases of Stewart and Campbell, that when the superior had confirmed the disposition from the last vassal, and sasine thereon,—that is, had granted the charter of confirmation,—the last vassal was fully divested, and the new vassal substituted in his place ; and that therefore the procuratory of resignation by the last vassal, and charter of resignation proceeding thereon, could carry no right, and authorize no further sasine. The argument was, that the last vassal was denuded wholly by the disposition, sasine, and charter of confirmation ; and that he had nothing remaining in him to resign in the superior’s hands, so as to authorize the superior to make a new grant. But that argument was overruled in Stewart’s case, chiefly on the ground that the dispositive or new vassal held an express obligation to infeft either by resignation or confirmation, or both, the one without prejudice of the other. In Campbell’s case, it was thought that a man holding sundry titles might found upon any of them, and that third parties could not make his right hand fight against his left.

We meet with charters of the above description very rarely indeed ; and I am not aware of any circumstances in which such a form of title is convenient and advisable. Mr. Duff refers to it, under the heading or

¹ Stewart, 20th Feb. 1827, 5 Sh. 383. See also Campbell, 4th Jan. 1754, 5 Br. Supp. 809.

rubric 'erroneous combination of the charters of resignation and confirmation.'

The other instance, in which we meet with the combined charter of resignation and confirmation, has been of more frequent occurrence; though, as charters of resignation are now to operate confirmation of prior writs, the combined charter of resignation and confirmation will become obsolete. Such form of title was applicable to the case where the last vassal had granted a disposition containing obligation to infeft *a me vel de me*, and precept of sasine, on which sasine or registration had followed; and where the disponent, after being infeft or registered, but without having obtained a charter of confirmation from the superior, had himself granted a disposition, with similar manner of holding, and procuratory of resignation, and with or without precept of sasine, but on which sasine or registration had not followed. The writs were—disposition, registered or followed by sasine; and second disposition unregistered and without sasine;—or there might, in the first place, be a series of dispositions registered or followed by sasines; and lastly, a disposition without registration or sasine.

The resignation in the hands of the superior, and the superior's charter, proceeded on the procuratory in the last-mentioned disposition, being that not followed by registration or sasine, and which had been granted by a party who, though infeft, had never got his infeftment confirmed, and, therefore, was not a vassal entered with the superior who was to grant the charter of resignation. But resignation is competent only by a vassal in the hands of his own immediate superior. The superior cannot receive resignation from one not his vassal; and the granter of the procuratory, in the case supposed, although the last heritable proprietor, was not entered with the superior. He had been registered or infeft; but his title was not confirmed. In strict language, he was not the vassal. The superior, therefore, combined, with the charter of resignation following on the procuratory which had been granted by the party in question, a charter of confirmation of that party's infeftment or registered disposition, and of the previous infeftments or registered dispositions, if there were any. This confirmation operated *retro*, so as to make the infeftment or right of the granter of the procuratory an infeftment or right holden of the superior as from its date. The procuratory of resignation became thereby—that is, as being granted by one holding directly of the superior—a warrant for resignation in the superior's hands, for new infeftment in favour of the disponent in the disposition which contained the said procuratory, just as if the confirmation had been granted separately, and before the date of the procuratory. The case was exactly the same as if there had been first a separate charter of confirmation in favour of the granter of the procuratory, completing his title and making him the entered vassal of the superior, and then a separate charter of resignation following on that party's procuratory. Sasine on the combined charter of resignation

and confirmation, or the registration of that charter, completed the title.

The clauses of the combined charter were,—

The inductive and dispositive, as in an ordinary charter of resignation.

CLAUSES OF
CHARTER OF
RESIGNATION
AND CONFIRMA-
TION.

The *quæquidem*, which was similar to the *quæquidem* in the ordinary case, with this exception, that, when narrating that the lands formerly belonged to the resigner, holden by him of the superior, etc., it said, that the lands were so holden 'by virtue of the confirmation after written.' In the case of the simple charter of resignation (before the Titles Act of 1860 came into operation), the procuratory was granted by a vassal whose title was already complete by a charter from the superior, and sasine thereon or its equivalent, and who already held of the superior. In the case now under consideration, the granter of the procuratory had a disposition from the former proprietor,—with sasine or its equivalent,—and he had not obtained a separate charter of confirmation. But the confirmation combined with the resignation operated in like manner with a separate confirmation; and so it was said that the lands were holden by the resigner of the superior, 'by virtue of the confirmation after written.'

We have next the *tenendas* and *reddendo* as usual; and then the confirmation of writs, beginning with the disposition by the last vassal, and going on downwards to the sasine in favour of the granter of the procuratory, inclusive. In this case, it was not enough merely to confirm the last sasine. The provision to that effect in the Transference of Lands Act of 1847 did not apply to cases of confirmation combined with resignation; but any omission to grant confirmation in such cases is now rendered of no importance by the Titles Act of 1860, sect. 39.

We have also, in the combined charter, the clause dispensing with the generality of the confirmation; and

Clause of registration, and other clauses usual in charters either of confirmation or resignation, and which have already been considered.

The combined charter of resignation and confirmation authorized the exaction of only one composition or entry-money, whatever might be the number of the transmissions to which it related. But I hold that, on the same grounds as in the case of the simple charter of resignation, the superior was entitled to require that the combined charter should be followed by sasine or its equivalent, in favour of the grantee; so that the superior might have a vassal, and that his future casualties might not be evaded.

I shall now notice two cases in which errors have been apt to arise in completing a purchaser's titles by entry with the superior.

ERRONEOUS
COMPLETION OF
PURCHASER'S
TITLE.

In both cases, the purchaser has obtained a disposition with alternative holding, procuratory of resignation, and indefinite precept of sasine, and has expedite sasine on the precept, or has registered the disposition; and the error to be guarded against is that of making a separa-

last vassal's disposition and sasine thereon in favour of the seller, has been transferred to and vested in him, the purchaser, as just noticed.

Moreover, there will be no confirmation of the disposition by the last vassal, or of any sasine thereon in favour of the seller; because it was by that disposition, and sasine thereon or its equivalent, that the subaltern fee in the person of the seller was constituted or created. The disposition, with its *de me* holding, was, in fact, the original charter of that subaltern fee; and the superior never confirms a charter granted by himself or his predecessor in the superiority. Such charter already has, in itself, all the qualities which confirmation by the superior imparts to ordinary deeds of transmission.

But the purchaser, though he has, by the procedure above detailed, transferred to him all the feudal estate which was in the seller, has such estate in the form of two separate fees or feudal estates; and these, though vested in one and the same individual, will remain distinct and separate estates, and will require to be transferred to heirs and singular successors, just like two estates which have no connexion with each other, until they shall be again united and consolidated. The consolidation is effected by resignation *ad remanentiam*,—a process which will be explained after we have examined the titles appropriate to the conveyance of estates of superiority or *dominium directum*.

FORMS AUTHORIZED BY TITLES ACTS.

I now notice the variations in the mode of proceeding to complete the purchaser's title, by resignation or confirmation, authorized by the Titles to Land Acts of 1858 and 1860.¹

We have already seen that, in proceeding by confirmation, the registration of the disposition by the last vassal is equivalent to expeding and recording sasine on that deed; and that registration of the charter of resignation, or of the combined charter of resignation and confirmation, is equivalent to expeding and recording sasine on such charters.

It is also provided by the Titles Act of 1858, sect. 10, that, in charters of resignation and confirmation, and other charters by progress, it shall be competent and sufficient to refer to the *tenendas* and *reddendo* of the lands, as set forth in any charter or other writ recorded in any public register; and subject-superiors are taken bound, if required, to grant charters by progress, containing such reference, in like manner as they were formerly bound to grant similar charters according to the older form. Such a mode of proceeding was always competent and sufficient; but, before the passing of the Act, the vassal could not require the superior to insert a reference to the *tenendas* and *reddendo*, in place of the full specification. The change, introduced by the Act, thus consists in the right thereby given to the vassal, to insist on the reference to the above clauses, wherever they are contained in a recorded writ.

WRIT OF CONFIRMATION.

But the more important changes, introduced by the Act of 1858, are to be found in sects. 6, 7, 8, and 9; in which Writs of Confirmation and

¹ 21 & 22 Vict. c. 76, and 23 & 24 Vict. c. 143.

Writs of Resignation are authorized, in cases where charters of confirmation or charters of resignation would have been required under the former system. Sects. 6 and 7 refer to writs of confirmation by the Crown and by subject-superiors respectively; and the provisions applicable to both cases are as nearly as possible alike. We shall here take the case of the writ by the subject-superior; reserving consideration of the writ by the Crown until we are considering entries with the Crown.

The object of confirmation is to make the infeftment or title confirmed an infeftment or title holden of the granter of the confirmation as superior. We have seen also that the only essential part of the charter of confirmation is the confirmation of writs, or of the lands and writs. The writ of confirmation is just, in a short form, the charter of confirmation written on the new proprietor's recorded disposition or other title. The superior thereby confirms 'this deed' (or as the case may be), in so far as consistent with some former charter or other writ specified, containing the *tenendas* and *reddendo*, and with his own rights. There is here the confirmation, which, as I have explained, is the essential of the charter.

This writ is very suitable to the case where the deed or instrument confirmed contains all the lands embraced in the last charter, and no other lands. If the deed confirmed embraces other lands besides those in the prior charter referred to, then the confirmation should be qualified so as to be only in so far as consistent with the prior charter, and in so far as regards the lands in such charter.

And the *reddendo*, if different from that in the charter referred to, as by splitting of a cumulo feu-duty, or otherwise, ought to be specified, not merely referred to, in the writ. In such cases there is no opportunity of proceeding by reference. The writ is not very well adapted to complicated cases. In such cases, particularly where the deed or instrument confirmed contains portions only of several original feus, it will be found convenient, and little if at all more expensive, to employ the separate charter of confirmation.

The writ of confirmation operates to confirm not merely the disposition or writ expressly confirmed, but 'the whole prior deeds and instruments necessary to be confirmed in order to complete the investiture of 'the party obtaining the confirmation.' It has thus the full effect of the charter of confirmation expressly applicable to the whole series of conveyances from the last vassal to the new vassal; or of the charter of confirmation of the lands and of the new vassal's sasine therein, introduced by the Conveyancing Acts of 1847.

Sects. 8 and 9 of the Act of 1858 refer to writs of resignation by the Crown and by subject-superiors respectively; and I will here, as in the case of the confirmation, take the case of the writ by the subject-superior.

In the entry by resignation, the lands are given back by the last vassal to the superior, in order that he may dispoise them to the new proprietor: the superior, by the charter of resignation, gives, grants, and

dispones the lands accordingly; and, when the charter is followed by sasine or its equivalent, the new vassal's title is complete. By the writ of resignation, the superior, in respect of the clause of resignation contained in the disposition on which the writ is written, dispones the lands contained in said disposition to the new vassal; but only in so far as consistent with some former charter or other writ specified, containing the *tenendas* and *reddendo*, and with the superior's own rights. If the deed, on which the writ of resignation is written, embraces other lands besides those in the prior charter referred to, then the disposition in the writ of resignation will be limited accordingly; and, as in the case of the writ of confirmation, the *reddendo*, if different from that in the charter referred to, ought to be specified in the writ. There is no room for reference in such cases. The disposition, with the writ of resignation thereon, is declared equally effectual with a charter of resignation. The writ is further declared to operate the confirmation of the whole prior deeds and instruments necessary to be confirmed 'in order to complete the investiture of the party obtaining the writ.' It thus is intended to take the place not merely of the simple charter of resignation, but of the combined charter of resignation and confirmation. And the Act provides that the recording of the writ of resignation, and of the disposition on which it is written, with the proper warrant of registration written thereon, shall have the same legal force and effect in all respects as if a charter of resignation had been granted, and such charter had been followed by an instrument of sasine duly expedite and recorded, at the date of recording the disposition and writ of resignation in favour of the party on whose behalf the deed and writ are presented for registration.

We have seen that if the disposition from the former vassal to the new vassal is followed first by sasine or its equivalent, and then by a charter of resignation with sasine thereon or its equivalent, the new proprietor, though he has transferred to him the whole feudal estate which belonged to the last vassal, has it so transferred in the form of two separate and distinct fees or feudal estates, the one holden of the last vassal's superior, the other holden of the new vassal himself. The object of the writ of resignation was to come in place of the charter of resignation, and to be the warrant for giving the new vassal a complete title, just as the charter of resignation would have done. But the writ of resignation is to be written on the disposition by the last vassal. It is merely a relative writ; and, in order to its being intelligible and effectual, it is necessary that the disposition on which it is written, as well as the writ itself, shall be registered. Registration of the disposition, however, is equivalent to expediting sasine thereon; and, if sasine be expedite on the disposition, a subaltern right is created, holden of the granter of the disposition; and the charter of resignation, following on the same disposition, will, when registered, contain another fee or feudal estate, being the superiority of the subaltern right created by

the disposition and sasine thereon or its equivalent. To prevent this consequence in the case of writs of resignation from the Crown, the Act of 1858, by sect. 8, provided that the registration of the disposition, with the writ of resignation written upon it, should *not* have the effect of an instrument of sasine on the disposition. But, by some oversight, sect. 9, applicable to writs of resignation by subject-superiors, provided that the recording of the disposition, 'along with the writ of resignation written on it, *shall have* the effect of an instrument of sasine following on the 'disposition.' In these circumstances, and so long as the above provision of sect. 9 was unaltered, the writ of resignation by subject-superiors could not be made use of without creating a separation of fees, and making two feudal estates, requiring to be consolidated by resignation *ad remanentiam*. But by the Titles Act of 1860, sect. 33, the above provision in the Act of 1858 is corrected; and writs of resignation can be obtained from subject-superiors, as well as from the Crown, without the creation of any separate fee of property, in like manner as if the Act of 1858 had expressed that the recording of the disposition, with instrument of resignation thereon, should not have the effect of an instrument of sasine following on the disposition. The correction in the Act of 1860, moreover, operates retrospectively, so as to prevent the creation of separate fees under the Act of 1858, even when the form thereby authorized was resorted to prior to the passing of the Act of 1860.

ERROR IN
TITLES ACT
OF 1858.

CORRECTED BY
ACT OF 1860.

The writs of resignation and confirmation are intended simply to come in the place of charters of resignation and confirmation, and to confer no rights which were not formerly available to parties desirous of obtaining entries by resignation or confirmation. The Act accordingly provides that the right of requiring the writs of resignation or confirmation shall be available only to parties entitled to demand entries by resignation or confirmation; and that such parties shall, if required, produce to the superior a charter, or other writ, showing the *tenendas* and *reddendo* of the lands to which the writ will apply; and shall also, at the same time, pay or tender to the superior such duties or casualties as he may be entitled to demand,—that is, the parties are to transact with the superior for writs just as formerly for charters. The superior, on the other hand, is bound to grant the writ of resignation, or of confirmation, as the case may be, if required so to do, just as he was formerly bound to grant the corresponding charters.

The writs might have been much more technically constructed with reference to their purposes, and still have been kept as brief as they are in the Act; but, now that the error in regard to the writ of resignation by subject-superiors has been corrected, they operate a great improvement on our system.

The Act of 1860, sect. 40, provides that writs of confirmation and of resignation, granted by subject-superiors in virtue of the Act of 1858, shall be authenticated in the form required by the law of Scotland in the case of ordinary deeds. This rule had been generally acted on in

practice; and any such writ, without an ordinary testing-clause, and subscriptions by party and witnesses, should be rejected.

STAMP DUTY.

The Act of 1860, sect. 41, declares the stamp-duty chargeable on writs of confirmation and of resignation, granted or to be granted in virtue of the Act of 1858, to be the same as that chargeable on charters of confirmation and charters of resignation. This rule likewise had been previously acted on in practice.

CHAPTER IV.

I WILL now explain the form of dispositions of superiority only.

**DISPOSITION OF
SUPERIORITY.**

The only differences between the form of the disposition of superiority and that of the disposition of property and superiority united are, that the former (the disposition of superiority) assigns feu-duties, or blench-duties, and casualties, where the latter assigns rents; and the former excepts from the warrandice the feu-rights of the lands, but without prejudice to the disponent to reduce them on any ground in law not inferring recourse on the warrandice therein against the disponent, or those whom he represents. The latter (the disposition of property and superiority united) will contain a corresponding exception of leases to tenants, if there are any.

**INTERJECTION
OF SUPERIORS.**

We often find that dispositions of superiority contain obligation to infest *a me* only; and, no doubt, it is not lawful for a superior, who has not reserved special power to that effect, to create, or, as it is called, interject a mid-superiority fee, between the superiority and the property.¹ But the objection to his interjecting a mid-superiority is personal to the vassal; because he has an interest to prevent the number of the superiors between him and the Crown from being increased. Accordingly, the consent of the vassal, or his acquiescence, will bar all challenge to the interjected right;² and the right of objection can be lost by the negative prescription. In dispositions of superiority, therefore, the manner of holding, if expressed, ought to be *a me vel de me*. If no holding is expressed, the *a me vel de me* holding will be implied, unless the disponent is subject to a prohibition against subinfeudation, or against granting an alternative holding. The registration of the disposition will divest the disponent at once of all beneficial right; and, though the vassal may object to the disponent's title until it is confirmed by the disponent's superior, it is equally competent for the disponent to obtain confirmation

¹ Douglas, 25th June 1670, M. 15,012;
Archbishop of St. Andrews, Dec. 1682,
M. 15,015.

² Hotchkis, 6th December 1822, 2
Sh. 70.

of a title holden *a me vel de me*, as of one holden *a me* only. The disponee with the alternative holding can therefore at once remove the vassal's objections, by obtaining confirmation from his superior. Thus, there may be advantages, and there can be no disadvantage, in the course here recommended. Power to interject a superior without the vassal's consent is, however, sometimes reserved to the superior in an original feu-right; in which case it is, of course, competent to the superior to create a valid right of mid-superiority, whether the vassal consents or not. The vassal cannot object to the superior granting real securities over the superiority, by dispositions to be holden *a me vel de me*, and in virtue of which the creditors holding such securities shall obtain right to levy the feu-duties from the vassals.¹ These securities do not, in fact, interject a superior. The right to the superiority, though burdened with the security, remains as it was before the securities were granted. But if the granter of the security dies, and his heir does not enter to the superiority, the vassals are not bound to pay their feu-duties to such heir; and no more will they be bound (whilst the heir is unentered) to pay the feu-duties to his heritable creditors.² Bonds and dispositions in security, as now framed, do not contain any express clause relative to the holding of the lands disposed; but the Heritable Securities Act of 1847³ declares them to be as effectual and operative as if they contained obligations to infest *a se vel de se*, and the other clauses formerly usual in such deeds. The import and effect of these deeds, therefore, in connexion with superiorities, are the same under the modern as under the older form.

The same rule of law which protects a vassal against the interjection of a mid-superior protects him also against the multiplication of superiors; that is to say, the superior cannot, if the vassal objects, convey the originally undivided superiority in several divided portions, so as to make his vassal hold the property of more than one superior.⁴ The vassal's right of objection is available, though the separate conveyances of the superiority are in liferent only.⁵ But though several subjects, held of one superior by separate titles, shall happen to become the property of one individual, and such individual is entered in the whole as vassal, or *vice versa*, the superior is not thereby prevented from conveying the superiority in separate portions, in like manner as he could have done before the property came to be acquired by one individual; provided the superior has never included the property in one and the same charter.⁶ And, even though the property of the whole has been included in one charter, yet, if the separate descriptions of the several portions, and their respective clauses of *reddendo*, are preserved as they stood before that charter was granted, the superior will

¹ Home, 22d Jan. 1794, M. 15,077.

² *Ibid.*

³ 10 & 11 Vict. c. 50, s. 1.

⁴ Montrose, 31st Jan. 1781, M. 8822;

affirmed 19th Feb. 1782, 6 Paton's App. 805.

⁵ Graham, 23d May 1826, 4 Sh. 615.

⁶ Dreghorn, 5th Aug. 1774, M. 15,015.

retain his original power of separate disposal of the superiority.¹ Moreover, it is not a multiplication of superiors, to convey the superiority to two persons jointly, and *pro indiviso*; because feudal estate, when so disposed, does not belong to the parties in several portions: each has a common right to the whole.² The objection in this case, likewise, is personal to the vassal, who may depart from it by consent or acquiescence, or may lose it by not objecting during the prescriptive period of forty years. But his consenting to a specific multiplication does not preclude him from objecting to a subsequent and different multiplication;³ and the division of the superiority among liferenters only, though for forty years, does not cut off the right of objection. The vassal can afterwards object to multiplication by separate conveyances to fiars.⁴ The superior may, moreover, in his charters reserve express power to divide the superiority without the vassal's consent, and exercise the reserved power accordingly.

In disposing superiority, the dispositive clause ought to convey the lands, just as if both property and superiority were included.⁵ This is important in connexion with questions as to the union or consolidation of the property with the superiority by prescription; a subject to be presently fully discussed. The exception of the feu-rights from the clause of warrandice prevents the conveyance, in the form here recommended, from importing more, as against the disponent, than a conveyance of the superiority; that is, of the lands, under the exception of the subaltern rights held by the vassals. It was formerly held, that when the superior had in his titles only 'the superiority and feu-duties' of the lands,—not the lands themselves,—he could not pursue an action of reduction-improbation and declarator of non-entry against the proprietor of the lands; because that action concludes for annulling the whole rights to the fee of the *dominium utile*, or property, and the forfeiture of that fee to the pursuer of the action; and it was thought that a party who was not infeft in the lands, but only in the superiority and feu-duties, could not, on that title, demand that the *dominium utile*, or property of the lands, should be forfeited to him.⁶ But it was afterwards decided, that an infeftment from the Crown in the *dominium directum*, or right of superiority of the lands, was a good title on which to claim enrolment as a freeholder; that is the right, as holding lands of a certain value, or estimated value, of the Crown as superior, to vote in the election of a county Member of Parliament, as the franchise stood prior to the Reform Act. That privilege was then attached exclusively to the right to lands held of the Crown as superior.⁷ Lord Balgray, who was an eminent feudal lawyer, in Hamilton's case insists that a conveyance of the superiority is exactly of the same value as a conveyance of the lands

¹ Lamont, as reversed, 8th Feb. 1819,

⁵ Stair, ii. 4. 1.

⁶ Paton's App. 410.

² Cargill, 21st Jan. 1837, 15 Sh. 408.

⁶ Park, 16th May 1816, F. C.

³ Mure, 18th May 1824, 3 Sh. 17.

⁷ Hamilton, 23d Feb. 1819, F. C., and

⁴ Stewart, 14th May 1823, 2 Sh. 300.

Ross's Leading Cases, i. 22.

under exception of the property; and, in the subsequent case of Gardner,¹ an infeftment of the superiority, or *dominium directum* of the lands, was sustained as a good title on which to pursue an action of non-entry against the proprietor. It is not, therefore, a sound objection to the title, that the estate conveyed is described as the *dominium directum*, or superiority. But it is more usual—and on strict feudal principles, and with reference to questions of prescription, more correct—to dispoise the lands, and to except the feu-rights from the warrandice.

There is no difference in form between the disposition of superiority DISPOSITION
TO VASSAL. to the vassal, and to a stranger. But a disposition to the vassal himself, with all right, etc., implies, when delivered, a discharge of the byegone feu-duties.² The destination to heirs in a disposition of the superiority, in favour of the vassal in the property, should be well considered; because, if the property-fee is afterwards consolidated with that of the superiority, the latter will regulate the succession to both. I may here remind you of the necessity of examining the original feu-right of the property-fee, when acting for the purchaser of the superiority, to see whether any obligations of relief of augmented stipend, or other similar burdens, are contained therein; because such burdens would apparently affect a singular successor in the superiority.

The titles to an estate of superiority are completed by writs similar in all respects to those employed in reference to an estate of property. The dispoinee may either proceed by resignation, and obtain a charter of resignation from the Crown, or other superior, and register or pass infeftment on such charter; or he may obtain a writ of resignation on the disposition in his favour, and register the disposition and writ; or, proceeding by confirmation, he may register the disposition in his favour, or pass infeftment thereon, and obtain a charter or writ of confirmation from the superior. There is now no occasion for a charter of resignation and confirmation combined; because the granting of a charter or writ of resignation implies confirmation of all writs requiring to be confirmed in order to the validity of the charter or writ. I have already explained the forms of the separate charters of resignation and confirmation, and of both combined, and of the writ of confirmation, or of resignation, when granted by subject-superiors. The Crown writs have a testing-clause appropriate to writs from the Crown, as given in schedules (E) and (F), annexed to the Act of 1858. If the Crown is the superior, the charter—whether of resignation or confirmation—will be the same in regard to form as in the case of a subject; with this exception, that, in the *quæquidem* of the Crown charter of resignation, the writs by which the last vassal held the lands of the Crown will be specified; and it is not usual to notice the corresponding writs in similar charters by subjects.

A very short explanation will show the manner of obtaining and com- CROWN
CHARTER. pleting the Crown Charter. To prevent abuses in the preparation of such

¹ Gardner, 9th Feb. 1841, 3 D. 534.

² Earl of Argyll, 14th Dec. 1676, M. 842.

charters, it was long ago made necessary, that the first step towards the issuing of a charter should be the lodging, in the Court of Exchequer, of a warrant for the charter to be revised by the heads of the Exchequer Court. This warrant, after revisal, had impressed on it, by means of a stanip, a copy or cachet of the royal sign-manual, or signature; and, on that account, it was called a 'signature.' It was, however, except as to some formal details, really and truly the draft of the charter wanted from the Crown; and it was accordingly called signature of resignation, or signature of confirmation, or of adjudication, as the case might be. The officer with whom it was lodged was called the Presenter of Signatures; because it was his duty to present the signature to the Barons of Exchequer for revisal, and to act as their clerk in the revisal. The signature was prepared and indorsed by a Writer to the Signet. It was then subscribed by the barons, and superscribed with the cachet,—that is, it had the royal signature impressed on it at its commencement. Thereupon it was recorded in Exchequer, and became a warrant for a precept under the Signet, addressed to the Keeper of the Great Seal of Scotland, or, after the Union of England and Scotland, the Union Seal,—being the seal appointed by the Treaty of Union to be kept and used in Scotland in place of the Great Seal of Scotland,—desiring the keeper of the seal to issue a charter under the Great Seal, or the Union Seal, in favour of the party. This precept, which was subscribed on each page by a Writer to the Signet, was little else than a translation of the signature into the Latin language. It required to be signeted just as signet letters now are; and the signature was kept at the Signet Office as the warrant for signeting the precept. When signeted, the precept was handed to the clerk of the Chancery, whose business it was to frame the Crown charter. This being done, the charter was signed on each page by the Director of the Chancery, and transmitted to the Keeper of the Great Seal, or Union Seal, by whom it was subscribed on each page, and docquetted as sealed, and it was then given out to the party. But it was not usual actually to append the seal. The charter ordered the seal to be appended, but the order was not observed in practice.

CROWN
CHARTERS ACT
OF 1847.

These forms were, to a large extent, altered and simplified by the Crown Charters Act of 1847.¹ By that Act the preliminary signatures and precepts were abolished. The applicant for a charter is appointed to lodge with the Presenter of Signatures a draft of the charter which he wants, with a short note, praying that a charter, in terms of the draft, may be granted. The draft charter must, like the signature, be prepared and indorsed by a Writer to the Signet, who must also sign the note. With the draft charter, the applicant must produce the last charter or other writ flowing from the Crown, with the subsequent titles, for enabling the Presenter to revise the draft. He must also produce a certificate of the valued rent of the lands in the cess-books, as containing the data for fixing, or, as it is called, 'striking,' the composition or entry-

¹ 10 & 11 Vict. c. 51.

money for the new proprietor's entry as vassal. The amount thereof, in the case of a singular successor, will be one-sixth part of the old valued rent of the lands; in the case of an heir, entering by charter, ten merks Scots. The certificate of valued rent is further required for assessing the Exchequer fees of the charter. The Presenter is to revise the draft charter with the agent. The draft, when revised, is docqueted by the Presenter and agent as approved; the composition, or entry-money, is paid; and the draft is transmitted by the Presenter to the Chancery, where the charter is engrossed, signed by the Director of the Chancery, transmitted to the Keeper of the Union Seal, and sealed, the keeper of the seal signing each page. Between the time when the Crown Charters Act of 1847 and the Titles to Land Act of 1858 came into operation, the keeper of the seal also affixed the seal to Crown charters, in consequence of an express order to that effect contained in the Crown Charters Act, sect. 15; and the charter, during the period in question, bore not only as formerly the order to affix, but likewise the statement that the seal was affixed. But, by the Titles Act of 1858, sect. 32, the actual appending of the seal is made unnecessary.

The Crown Charters Act makes provision for settling questions or objections arising at revival of the drafts of charters, and for correcting errors in clauses of *reddendo*; but with these I need not trouble you. The charter, as formerly mentioned, is now written in the English language (sect. 25). It is complete when sealed or subscribed by the Keeper of the Union Seal, and is of no avail till so sealed or subscribed.

Writs of confirmation and resignation are now to be granted by the Crown, in terms of sects. 6 & 8 of the Titles Act of 1858. The procedure in obtaining such writs is the same as that prescribed by the Crown Charters Act for obtaining the corresponding charters, which has just been explained. And the effect of the writ of confirmation is the same as of the charter of confirmation. The writ of resignation with the disposition on which it is written have together the effect of the charter of resignation, as before explained. The forms of the writs, both of confirmation and resignation, as granted by the Crown, are in all respects similar to those by subject-superiors. In fact, the Crown writs are the models for those by subjects. But, as already observed, the writs by subjects require to have the testing-clause of an ordinary deed.

Proprietors of lands held of the Crown as superior occasionally desire to obtain alterations of the manner of holding, or extensions of grants from the Crown; for example, rights of mines, salmon-fishing, or some other natural adjunct. For these purposes, the Crown, if so advised, will grant a Charter of *Novodamus*, with the desired alteration, or a new or original charter, containing the addition; and, in order to the new grant, the applicant must obtain the consent of the Commissioners of Her Majesty's Woods and Forests, or two of them. He produces written evidence of such consent to the Presenter of Signatures, who thereupon revises the draft relative charter; but in this case, being the case of a

CROWN WRITS
OF CONFIRMA-
TION AND RE-
SIGNATION.

CROWN
CHARTER OF
NOVODAMUS.

new alienation of Crown property, the draft requires the Sovereign's actual sign-manual to be superscribed, and the signatures of three of the Lords Commissioners of the Treasury to be subscribed, in order to its being a warrant for a charter to be sealed or subscribed by the Keeper of the Union Seal.

When the Crown charter is of resignation, it is followed by registration, or instrument of sasine, as in an ordinary case; but no remark occurs in regard to the form of the instrument of sasine when employed. Like the charter, the instrument is in English, and it ought to be so even although the charter on which it proceeds is in Latin.

CHAPTER V.

DISPOSITION AND ASSIGNA- TION.

I NOW take the case of dispositions by parties having right to lands under conveyances, or other titles, authorizing, but not followed by, registration or sasine. The conveyance of lands, when of the nature of a proper transmission, and not a new constitution, is always called a disposition,—a deed by which the granter *puts away* from him his lands. But when the granter's right is not real, but depends on a disposition not followed by sasine or registration, something more ought to be done besides putting away the lands. The disposer's title to the lands ought likewise to be transferred to the purchaser; because the disposer does not give his own warrant for constituting a real right in the lands in the person of the purchaser. He has no real right in himself, and is therefore not in a condition to give a real right to another. But he can assign the warrant in his own favour, granted by his own predecessor; and he ought to do so. Hence the deed is called a Disposition and Assignment. The disposition puts away the lands, and the assignment makes over the disposer's titles. New forms are authorized by the Titles Act of 1858, sect. 13, which are thereby declared to have the force and effect of the ordinary disposition and assignment; but being, in terms, conveyances of the dispositions only,—not expressly of the lands therein contained,—they are, with strict propriety, described in the Act as 'assignments.'

CLAUSES.

The clauses of the disposition and assignment are,—

1, 2, 3, & 4. The narrative, the dispositive, the clause 'together with all right, title,' etc., and the declaration of the term of the purchaser's entry. All these will usually be *verbatim* as in the ordinary disposition, except that the disposer will not describe himself as heritable proprietor of the lands. He has no real right; only a personal right unfeudalized. There will be no obligation to infest, nor specification of the manner of holding, nor procuratory of resignation. The disposer is not himself

registered or infeft, and cannot grant infeftment, or any real right, or warrant for a real right, to his disponee; nor can he create a subaltern holding, even alternatively, and to be ultimately evacuated. No one can hold the lands of him as superior, because he himself has no right in the lands; and, feudally, he has no connexion with the lands. He conveys, and can only convey, the lands to be holden as he himself holds; and this result follows, as matter of course, without being expressed.

5. The assignation to writs comes next. The usual clause in the disposition is,—‘And I assign the writs.’ Under the provisions of the Lands Transference Acts of 1847, the same clause will, in the disposition and assignation, be quite sufficient without the addition of any special assignation of the disposition in favour of the disponent, or clauses therein; and I think it not advisable to add anything more. If a special assignation of the disponent’s title is thought necessary, this clause may be in such terms as these:—‘And I assign the writs, and specially, ‘without prejudice of the said generality, a disposition of the foresaid ‘lands and others, dated the day of , granted by ‘E. F. in my favour; with the clause or procuratory of resignation and ‘precept of sasine’ (if there is any) ‘therein contained, yet unexecuted, ‘and with the whole other clauses and obligations therein contained, and ‘all that has followed or is competent to follow thereon.’

6, 7, 8, 9, 10, & 11. The clause relative to the delivery, or exhibition, of the writs will then be inserted, with the assignation to rents, obligation to relieve of feu-duties, etc., clause of warrandice, and registration and testing clauses, all as in the case of an ordinary disposition.

The precept of sasine is inappropriate to the proper disposition and assignation.

The usual form of deed applicable to this case is a disposition of the lands, and assignation of the granter’s title generally or specially, as in the clauses before given. But, independently of the Titles Act of 1858, it has been held that the formal clause disposing the lands is not essential in order to the full transfer, by one having only a personal right to lands, of the lands, and of the title thereto. It has been decided that one holding a disposition of lands, with unexecuted procuratory of resignation and precept of sasine, can effectually convey the lands by a simple assignation of such procuratory or precept; provided the purpose of the assignation, as intended to transmit the right and to enable the assignee to obtain infeftment in the lands, be explicitly stated.¹ In Renton’s case, the deed, which was held equivalent to a disposition and assignation of the lands and writs thereof, was in the form of a procuratory of resignation (which, as a mandate, can be granted only by a party infeft or registered), with an obligation to infeft and general assignation to writs. And it was held that the assignation to writs, accompanied by the obligation to infeft, and procuratory of resignation combined, or with

¹ Renton, 5th Dec. 1837, 16 Sh. 184; affirmed 18th Aug. 1843, 2 Bell’s App. 214.

either of these clauses by itself,—or with terms otherwise sufficiently expressive of the granter's intention to transfer the procuratory contained in the disposition in his favour, so as to enable the disponee to obtain infestment,—was a sufficient conveyance to operate the transmission of the lands. Indeed, the procuratory of resignation, granted by the party who held the personal right, was considered, in the circumstances, to amount to a mandate by that party to his assignee to use the procuratory held by the disposer.

FORMS INTRODUCED BY
TITLES TO LAND
ACTS.

The Titles Act of 1858, by sect. 13, authorizes the transfer of lands held on unrecorded conveyances or dispositions, in two new forms, of which schedules are annexed to the Act. By the first, which is an assignation written apart from the unrecorded conveyance, the party in right of such conveyance, in consideration of a price paid, or for other causes, assigns to the new owner and his heirs, etc. (as in an ordinary case), the disposition, or other deed, whereby the granter of the assignation has right to the lands; which disposition is described as 'granted by E. F., dated, etc., by which he conveyed the lands of X., as therein described, to me.'

If the disposition assigned is not granted directly in favour of the party who grants the assignation, any connecting links will be specified. If the whole lands contained in such disposition are not made over to the assignee, the precise extent of what is made over will be shown; and the assignation will state the term of the assignee's entry, and will assign rents and writs, express the arrangement as to the custody of the writs, the arrangements as to public and parish burdens, and contain registration and testing-clauses, all in the form usual in an ordinary disposition.

The second form is an assignation to be written upon the unrecorded conveyance. It is in all respects the same as that written apart, except that it describes the disposition assigned, not by specifying the granter, date, etc., but as 'the foregoing disposition of the lands of X., as therein described, granted in my favour,' or as the case may be; and here, as in the case of the assignation apart, if the disposition assigned is not granted directly in favour of the granter of the assignation, any connecting links will be specified. In other respects, the rules for the preparation of the deed in this case will be the same as in the case of the assignation apart.

These assignations have, by the Act of 1858, the same force and effect as the disposition and assignation in the old form already examined; and you will observe that what they convey is the disposition of the lands,—not expressly the lands. The effect of the disposition and assignation, or of the assignation in either form, when duly framed, is to put the grantee or assignee so far in his author's place that he can make his right real as fully as his author himself could have done; the assignee making use, for that purpose, of the disposition assigned, and of the assignation or assignations by which he has acquired right thereto;

and if such disposition contains, expressly or by implication, alternative manner of holding, procuratory of resignation, and precept of sasine, the grantee or assignee can proceed either in the way competent before the Titles Act of 1858 came into operation, or in the way authorized by that Act as applicable to the case in question. If the disposition contains, expressly or by implication, alternative manner of holding, and procuratory of resignation, but no precept of sasine, a title can be obtained by charter of resignation, and registration or sasine; or one or other of the modes of proceeding can be adopted, authorized by the above Act, as applicable to the particular circumstances of the case.

I will now go over the different modes of procedure here referred to; and first, supposing that the disposition which has been assigned contains procuratory of resignation,—the grantee or assignee can obtain a charter of resignation from the superior, following upon the procuratory in favour of the disposer, to which the assignee has acquired right by the disposition and assignation in his favour, and assignation to writs contained therein, or by the assignation to the disposition itself, granted in statutory form. Having obtained the charter of resignation, he will register the same, or expedite and record instrument of sasine upon it; or, instead of a charter, he can obtain a writ of resignation,—such writ being competent in favour of an assignee, as well as of an original disponee, with this difference in form, that a writ in favour of an assignee must specify the connecting links in the title. Such writs of resignation, and the dispositions on which they are written, when recorded, are declared equivalent to charters of resignation, followed by recorded sasine.

COMPLETION
OF GRANTEE'S
TITLE.

If the disposition which has been assigned contains, expressly or by implication, alternative manner of holding and corresponding precept, the grantee or assignee can expedite an instrument of sasine in his favour, in virtue of the precept to which he has acquired right by the disposition and assignation, or assignation in statutory form, as the case may be; or he can expedite a notarial instrument; and he will obtain a charter of confirmation, or writ of confirmation, of his title, from the superior.

The difference in the forms here referred to, as compared with those applicable to titles in favour of original disponees, consists in this:—

1. In the case of the title by confirmation,—if there is an instrument of sasine in favour of the assignee, it must expressly narrate not only the disposition containing the precept of sasine, but likewise the assignation, or series of assignations (technically called mid-couples), by which the assignee (or party infest) has acquired right. In the instrument according to the old form, the recital of the mid-couples was introduced after that of the disposition which contained the precept; the whole being produced on the ground of the lands. After such recital, the instrument, in the old form, narrated that all the writs were given by the notary to the bailie; and that in virtue of them all, and having them all in his hands, the bailie gave sasine. The instrument, according to the more modern form, begins by specifying shortly, and as in a mere

inventory, the writ or writs presented to the notary public ; which, in the case we are considering, will be the disposition, and disposition and assignation, or other mid-couples. The instrument will then narrate first the one, and then the other writs, fully ; and, after engrossing the precept of sasine contained in the disposition, will bear, that by virtue of the precept, and of the assignation or assignations thereto, the notary gave sasine. If a notarial instrument is made out, it will be in terms pretty similar to those of the modern instrument of sasine ; except that there will be no engrossment of the precept of sasine, nor clause of delivery of sasine. The deduction of titles, as above explained, has always been usual in instruments of sasine, and is clearly indispensable in order that the instrument may expressly show that the notary has authority to make it out in favour of the assignee. The disposition is in favour of A., and the instrument in favour of B. ; and the deduction of titles shows how B. acquired from A. Moreover, where either the granter or grantee of the precept of sasine has died before the sasine is passed, the deduction of the titles is a statutory requisite to the validity of the instrument in favour of the assignee.¹ When, however, the connecting link, or warrant of sasine, is a disposition and assignation by a party acting for another under a special factory or commission, the deed of factory or commission is not one of the titles which the Act requires to be expressed and deduced in the instrument.² If a charter of confirmation is granted, it will specially confirm the disposition and assignation, or other mid-couple, along with the other writs ; or, if it confirms the lands, and the instrument of sasine or notarial instrument only, it will describe the instrument as following on the disposition, and disposition and assignation, or other mid-couples. If a writ of confirmation is granted, it will be written on the instrument of sasine, or notarial instrument, and will be in exactly the same terms as if such instrument had followed on a disposition directly in favour of the party infeft.

2. In the case of the title by resignation, the charter of resignation must specially express the title of the party in whose favour the resignation is made. This is required by the Infestments Act of 1845 ;³ and the specification of the title is usually made in the *quæquidem* clause, which states that the lands were resigned, etc., by virtue of a clause (or procuratory) of resignation (as the case may be), contained in a disposition of the lands, dated _____ granted by A. (the last vassal) to B. (the granter of the disposition and assignation) ; to which disposition and procuratory of resignation therein contained the said C. (the new vassal) acquired right, by disposition and assignation, dated _____ granted by the said B. in his favour. The last part of this sentence is, in fact, all the addition usually found in the charter of resignation in favour of an assignee, beyond what is in such charter when in favour of a direct disponee. In reference to titles completed by resignation, the Act of 1693 required the deduction of titles to be made, not in the charter, but

¹ 1693, c. 35.² Proctor, 14th May 1796, M. 8871.³ 8 & 9 Vict. c. 35, s. 9.

in the instrument of resignation ; which was quite satisfactory where the instrument related to a resignation *ad remanentiam*,—that is, the instrument reciting the surrender or return by a vassal of his feu to his superior, to remain permanently with the superior. Such instruments were essential parts of the permanent title, and had the effect of divesting the disponent and investing the disponent, equally with instruments of sasine. But instruments of resignation for new infeftment by the superior to a purchaser or disponent,—technically called instruments *in favorem*,—never formed an essential part of the title to an estate. It has been said that they were anciently the legal evidence, the protest taken by the disponent or new proprietor, in the hands of a notary public, for instructing that the superior had accepted the resignation of the last vassal, and had become bound to grant new infeftment to the new proprietor. So long as they were used for that or any purpose, they must necessarily have been framed in conformity with the Act of 1693. But, after the passing of the Act 20 George II. cap. 50, making it imperative on superiors to grant new infeftment by resignation in favour of parties holding procuratories from the last vassals, it was unnecessary to prove the superior's obligation by form of instrument, or in any other way. The superior was bound by law to grant the entry by resignation ; and instruments of resignation *in favorem*, whether in favour of the original disponent or of an assignee deriving right from him, fell into disuse.

In framing charters of resignation following on a transmitted warrant, it had always been customary to deduce the titles of the assignees and others acquiring right to the procuratories on which the charters proceeded ; and this was done in the *quæquidem* clause, somewhat in the form of the example already given, though probably more in detail. And the only correct practice was so to express the connecting titles. The Act of 1693, however, did not enjoin the deduction of title in the charter of resignation, but only in the instrument ; and in Renton's case, before cited,¹ the Court refused to hold a charter of resignation, in favour of an assignee, null, although the assignee's title was not deduced, and the charter, as far as it went, appeared to be without due warrant, being granted in favour of B., yet reciting a warrant in favour of A., and nothing more. The Court, moreover, came to this conclusion, although it did not appear that there had been any instrument of resignation expedite as a step to the charter. In point of fact, however, the titles exhibited were valid and sufficient warrants of the charter, though not expressly deduced in it. These warrants were held sufficient, and the charter was sustained, although imperfect in its terms. The same anomaly, however, cannot now occur ; as, by the Sasines Act of 1845, which abolished the instrument of resignation *in favorem*, it is made necessary, as already stated, to deduce the titles in the charter of resignation.

The Titles Act of 1858 (Schedule F) requires the connecting links or

¹ See *ante*, p. 707.

mid-couples, in the case of writs of resignation in favour of assignees, to be shortly deduced. And by sect. 13 the Act authorizes the completion of the titles of assignees having right by assignations in statutory form, by recording the disposition assigned, together with the assignation or assignations thereof, in the appropriate register of sasines; a warrant of registration being written on the disposition, in the form of Schedule (A), No. 2, annexed to the Act. That warrant is in form as follows:—‘Register on behalf of A. B. (insert designation), along with the assignation (or assignations or notarial instrument) docquetted with reference hereto (or otherwise, as the case may be).’

(Signed)

A. B. (*party*)

(*or*)

C. D., W.S., Edinburgh

(*or as the case may be*).

Agent of the said A. B.

The conveyance, with such warrant of registration, along with the assignation or assignations, being so recorded, are declared to operate in favour of the assignee on whose behalf they are presented for registration, as fully and effectually as if the lands contained in the assignation (or, if there be more than one, the lands contained in the last assignation) had been disposed by the original conveyance in favour of such assignee; and the conveyance, with the warrant of registration, had been recorded, in the manner provided by the Act, of the date of recording such conveyance, and assignation or assignations.

It will be observed that the title, conferred as above, applies only to the lands contained in the assignation, or in the last if there are several assignations. The object of this provision is to prevent any question as to the effect of recording the principal disposition, in cases where assignees have right to portions only of the lands contained in it; and, no doubt, the provision in the Act would be effectual for that purpose; but it seems rather an awkward arrangement to record the original disposition when it contains lands as to which a real right is not intended to be constituted. I think the procedure authorized by this section ought to be adopted only when the party who records the original disposition has acquired, and wishes to obtain, a real right to the whole lands contained in that deed; and that, if he has acquired only a portion of such lands, he ought to proceed by notarial instrument, in terms of sect. 14 and the relative Schedule (B), which is framed with express reference to the case in question.

Sect. 13 of the Act of 1858 authorizes registration of the original disposition with assignation apart, and warrant of registration on the conveyance in the form of Schedule (A), No. 2. The title of that schedule is expressly applicable to the case of assignations apart being recorded; and accordingly the warrant of registration in that schedule describes the assignation as ‘docquetted with reference hereto.’ Sect. 13 then further authorizes the assignations to be written on the original disposi-

tion itself, and proceeds thus: 'And the conveyance, with such warrant of registration, along with the assignation or assignations separate from, or written upon, the conveyance, being so recorded, shall operate in favour of the assignee on whose behalf they are presented for registration,'—and so forth. The terms, 'such warrant of registration,' here used, carry us back to the warrant of registration, schedule (A) No. 2, previously specified; being that which is applicable only to assignations apart from, and not written upon, the principal disposition. The enactments of sect. 13, however, were intended to be, and are expressly made, applicable to the recording of assignations along with original dispositions, whether such assignations are separate from, or written upon, such dispositions. We are thus directed in one way by the enacting clause of the Statute, and in a different way by the schedule (A) No. 2, expressly referred to in said enacting clause. Moreover, the schedule (A) No. 1, in its title, expressly refers to the case of recording original dispositions 'without assignations apart.' The words of this schedule are, 'register,' etc., 'along with assignation, or assignations, hereon.' This is plainly the schedule applicable to the case of assignations written upon the disposition; but, not being referred to in the relative enacting clause, I doubt if it would be safe to make use of it,—especially as the schedule No. 2 is so plainly referred to in that clause. My inclination is to recommend that, when the case occurs, warrants of registration in both forms should be written on the conveyance; and that the assignation, or assignations, though written on the conveyance, should have relative docquets in conformity with the schedule No. 2. This is a clumsy mode of proceeding; but everything should be made subordinate to security of title. In the case of burgage titles, the same irregularity does not occur, as we shall by-and-bye see; but the Act of 1858, which relates to feudal subjects only, remains in the above particulars uncorrected.

By sect. 14 of the Act of 1858, it is provided that where any party shall have acquired right, by conveyance, assignation, or otherwise, to an unrecorded conveyance granted in favour of another person, it shall be competent to such party to expedite a notarial instrument in the form of schedule (K), setting forth the conveyance and the title, or series of titles, by which the party has acquired right thereto, and the nature and extent of his right; and to record the conveyance, along with the notarial instrument, in the register of sasines. Or, where it is not desired to record the whole conveyance, there may be a notarial instrument, in the form of schedule (B),—that is, the schedule applicable to conveyances contained in deeds granted for further purposes and objects, or conveying separate lands, or separate interests in the same lands, to the same or different persons. Such notarial instrument is to set forth, generally, the nature of the deed, and to contain, at length, those portions of the deed by which the lands, in regard whereto the instrument is expedite, are conveyed, and by which real burdens or conditions are imposed; and also to set forth the title,

or series of titles, by which the party has acquired right to the conveyance, and the nature and extent of his right. It is declared competent and sufficient to expedite and record such notarial instrument in the register of sasines.

If the first of these alternatives be adopted,—that is, if the conveyance itself is to be recorded, along with the notarial instrument, in the form of schedule (K),—a warrant of registration requires to be written on the conveyance; which warrant will be in the form of schedule (A) No. 2, before quoted; and the procedure will be similar in principle to that described by sect. 13; the difference being that, in terms of sect. 13, there will be recorded, along with the principal conveyance, the assignation or series of assignations thereto themselves. The notarial instrument will, in virtue of section 14, supersede the necessity for recording the assignation or series of assignations.

Or, if neither the principal conveyance nor the assignations are recorded, a notarial instrument may supersede the necessity for recording any of these writings. In this last case, no warrant of registration is required. There is no conveyance recorded. The notarial instrument alone is recorded; and that being an official document, under the hand of a notary-public, and bearing to be taken by or on behalf of the party interested, the necessity of the warrant of registration is entirely obviated.

In all cases, however, where the principal conveyance is recorded, the warrant of registration is required. The registration having taken place, the party expediting the instrument is declared, by sect. 14, to be in the same position as if the original conveyance had been granted to himself, and, along with a warrant of registration thereon, had been recorded in manner provided by the Act, of the date of recording the notarial instrument.

The form of the warrant of registration applicable to the registration of conveyances along with assignations apart, or notarial instruments, refers to such assignations or instruments as docquetted with reference to the warrant; and the docquet ought to be so framed as clearly to identify the assignation or assignations, or notarial instrument, containing or expressing the party's title, as the deeds or instruments recorded along with the conveyance. The docquet for this purpose may be as follows:—‘This is the assignation’ (or the ‘first’ or ‘second of the assignations,’ or as the case may be) ‘referred to in the warrant of registration written ‘on a disposition, dated the _____, granted by C. D., ‘in favour of E. F., of the lands of X. and others, as therein described; ‘and which disposition is to be recorded in the register of sasines, ‘along with this assignation’ (or as the case may be). The warrant of registration, in this case, applies not merely to the principal disposition, but likewise to the assignations thereof, and relative notarial instrument. The above form of docquet, which is in a great measure taken from the words of the notarial instrument in schedule (K), will fully accomplish

the object of identification; and the docquet should be signed in the same way as the warrant of registration,—that is, by the party or his agent,—the agent describing himself as such, and stating his profession and place of residence, exactly in the same way in both cases.

This mode of proceeding, authorized by sect. 14, is open to all parties who have acquired right to unrecorded conveyances. The mode authorized by sect. 13 appears open only to those holding assignations, in statutory form, to such conveyances. In this, as in an ordinary case of sasine, the competency or necessity of confirmation, and the amount of security arising independently of confirmation, will depend on the question, whether the disposition, which forms the leading warrant of the assignee's title, disposes the lands to be holden *de me* only, or *a me vel de me*, or *a me* only. But it is unnecessary again to go into that point.

The assignation, in either of the statutory forms, is clearly liable to the same stamp-duty as an ordinary conveyance of the lands. The amount of the duty will be regulated as in the case of an ordinary conveyance.

I have stated that, after execution of the disposition and assignation, or of the assignation in statutory form, the assignee is put so far in the disponent's place, that he can make his right real, as fully as the disponent himself could have done. And it is important that he should make his right real without delay. Because the disponent of a feudal estate is not divested until his disponent is invested; and if the right assigned is a proper personal right to lands, the holder of which can make up his title without the assistance of the Court, or of any third party,—if it is not a mere obligation, constituting a *jus crediti*, or right to demand a disposition from a third party,—the proper personal right is not taken out of the granter of the disposition and assignation by mere intimation to any one, or in any other way, until the assignee's right is made real. The assignee's right must be made real by registration of the disposition, and disposition and assignation, or of the sasine or notarial instrument thereon; and one or other of these steps is necessary, not merely for completing the assignee's right, but for divesting his immediate author, though such author never had a title which appears on the records, and had granted a conveyance of all his right and interest, such as it was. No doubt has ever been entertained with respect to the right (feudally speaking) of the last proprietor holding a real right to grant a second disposition, which, if in favour of a *bonâ fide* onerous disponent, and if first made real, will prevail over the first disposition subsequently made real. That is a contingency to which the assignee to the first disposition is exposed, just as the direct disponent himself is in all cases. But it was long an unsettled point whether an intermediate party, the holder of a proper personal right to lands, was not so fully divested by granting a disposition and assignation, expressly conveying the lands, and all his right, title, and interest therein, as that no right in favour of a third party could be obtained from or through him, either by means of a second

deed by him, or by judicial process. Contrary judgments on that point were pronounced by the Court: one, in 1676, holding that a second right, if first made real, would be preferable to the first right, if the first right remained personal; and another, in 1699, to the opposite effect. The point came again before the Court in the case of Bell,¹ where the ultimate decision was in favour of the party whose right, though last acquired, was first made real. The circumstances were these:—the purchaser of an estate at a judicial sale had obtained decree of sale (that is, a disposition by the Court of Session in his favour), but had not made his right real. He had, however, a proper personal right to the lands, enabling him, without recourse to any third party, to complete his title, and make his right real. The purchaser, in this state of his title, granted a disposition and assignation, disposing the lands to a third party, and assigning to him the decree of sale; but the assignee delayed to make his right real. By-and-bye a creditor of the first purchaser—that is, of the party in whose favour the decree of sale had been pronounced—obtained a judicial conveyance of the lands, and of the decree of sale, by a decree of adjudication (another form of disposition by the Court of Session), and then proceeded to make his right real by infestment; that is, he obtained from the superior a charter of sale, proceeding on the decree of sale in favour of the first purchaser, to which he, the creditor, had right by the decree of adjudication, and expedie sasine on the said charter. This creditor, being the first who made his right real, was found to have the preferable right to the lands in security and payment of the debt contained in the decree of adjudication.

The case is different, however, where the right transmitted is not a proper personal right to lands,—a right which can be made real without recourse against any third party,—but a mere obligation to convey lands, not affording to the holder direct means of completing a real right without the aid either of a third party, or of the Court as fulfilling an obligation incumbent on such third party. In the latter case, there is a simple *jus crediti* or debt constituted; and that, like any other proper debt, can be effectually and fully conveyed out and out by assignation duly intimated.² In Edmond's case, a purchase of lands had been made, under articles of roup which contained the usual obligation on the seller to dispose the lands to the purchaser. The articles were followed by various titles, which ultimately proved to be inept. The purchaser, in the meantime, granted a bond and disposition in security over the lands, which was duly recorded in the register of sasines. Thereafter he became bankrupt, and was sequestrated. The trustee for his creditors claimed the lands, as having the only perfect right to the articles of roup and obligation to grant a valid conveyance therein contained; but the bondholder maintained that the bond and disposition in security operated a good assignation of the *jus crediti*, or right under the articles,

¹ Bell, 22d June 1737, M. 2848; and Ross's L. C., ii. 410.

² Edmond, 16th Nov. 1855, 18 D. 47; affirmed Feb. 1858, 3 Macq. 116.

and that obligation to obtain such conveyance from the original sellers. He further maintained that the assignation, operated by the bond and disposition in security, being recorded for publication, must be held as duly intimated to all concerned. The Court sustained these pleas, and found that the conveyance by the original seller could not be granted to the trustee for the purchaser's creditors, except under the burden of the bond.

Cases of the above class, and in particular Edmond's case, correct, and in fact reverse, that of Strachan,¹ where a purchaser, conform to minute of sale, without having constituted a real right in his own person, granted a heritable bond over the lands purchased, on which the creditor was duly infeft. The purchaser (or debtor) became insolvent, and granted a conveyance of the same lands to a trustee for his general creditors. In the meantime, the heritable creditor, proceeding on the minute of sale in favour of the debtor, and obligation to convey absolutely and irredeemably therein contained, and on the assignation to writs contained in the heritable bond, obtained decree of adjudication of the lands in his own favour absolutely and irredeemably, in implement of the minute to which (as alleged) he had acquired right by the heritable bond. Upon this decree the heritable creditor obtained charter from the superior, and was infeft. The charter and sasine, like the decree, were conceived in his favour, absolutely and irredeemably. This was clearly wrong; for although, by the minute of sale, which was the foundation of these titles, the seller was bound to convey the lands absolutely and irredeemably to the purchaser (debtor),—the heritable bond, which was the heritable creditor's only title to the minute of sale, conveyed the lands to him only redeemably, and under reversion. The decree, charter, and sasine in favour of the heritable creditor ought to have been conceived in favour of the heritable creditor redeemably and under reversion. By virtue of the minute of sale, and of the trust-deed and assignation to writs therein contained, the trustee for the general creditors obtained decree of adjudication in implement, adjudging the lands to him, *quid* trustee, absolutely and irredeemably. Upon this decree the trustee completed his title by charter from the superior, and sasine thereon, which writs also were conceived to him absolutely and irredeemably, and properly so, because the full right under the minute of sale (so far as not previously conveyed to the heritable creditor), in security of his debt, was transferred to the trustee by the trust-deed. In these circumstances, the Court reduced the heritable creditor's decree of adjudication, and charter and sasine thereon, *in toto*, and preferred the trustee for the general creditors as having the only real right in the lands.

The plea successfully urged in Edmond's case, that the minute of sale was assigned by the heritable bond, and the assignation duly intimated by the registration of the sasine thereon, was not stated in this case of

¹ Strachan, 9th Feb. 1776, M. App. Adjudication, No. 7; Ross's L. C. ii. 480.

Strachan. Had it been so, we must assume that it would then have been sustained, to the effect of saving the heritable creditor's preferable security, as in a question with the trustee for the general creditors. The heritable creditor had plainly as good a position in regard to that plea, in such a question, as the heritable creditor in Edmond's case.

It naturally occurs also, that although the decree of adjudication which the heritable creditor obtained in Strachan's case, with the charter and sasine thereon, were irregular, as being in their terms absolute and irredeemable; whereas, in conformity with the assignation thereof to the heritable creditor, they ought to have been granted to him *redeemably and under reversion*,—the reduction of these titles need not have been absolute, but only in so far as they went beyond the right conferred by the heritable bond. There are various cases in which such partial reduction has been held sufficient; but the palpable irregularity of the titles in Strachan's case upset them entirely;—a result which gives a somewhat instructive warning to Conveyancers to be careful to frame titles in strict accordance with their warrants.

CHAPTER VI.

CONSOLIDATION OF PROPERTY AND SUPER- IORITY.

WE are now to consider the subject of the re-union or consolidation of separate fees or feudal estates; and I will notice first those cases in which such re-union follows the superior's re-acquisition of the fee of property from his vassal, or of the vassal acquiring the superiority from his superior.

When the superior or his predecessors gave out the property, they did not divest themselves of their entire feudal estate. They retained what is commonly known as the superiority, or *dominium directum*; but, to speak with more technical accuracy, they retained the lands themselves, except so far as these were given out to the vassal by the charter in his favour. In the cases we are considering, the right to the two estates, the estate reserved and the estate given out, meets in the same person; and, at first sight, it may appear that, on the superior becoming proprietor both of the estate from which the property-fee was given off and of the property-fee so given off, the two rights should of themselves, and *ipso jure*, amalgamate and re-unite, and become feudally one, as they were at first. And in earlier times, particularly when there were no systematic registers, property-fees were renounced by the vassal, and held thereupon to become incorporated with the superiority.¹ This result would still follow, if the property-fee were of the nature of a mere

¹ Duff's Feudal Conveyancing, p. 235.

burden on the superiority ; renunciation being the appropriate mode of extinguishing a burden on lands. But the property-fee is not a burden in the proper sense of that word. It cannot be restored to the superior, or extinguished, by mere renunciation.¹ It is a separate feudal estate and right ; and, until it is legally extinguished, even the superior himself, if he acquires it, must make up titles to it with the same formality which he would observe in respect to lands of which he was not the superior.

The practice or course to be followed, with a view to extinguish a property-fee, was long unsettled. Something like a rule was first adopted in the case of a purchase by the superior from his vassal. The re-union or absorption of the property, with or into the superiority, was desired ; and it was seen to be necessary that a form of proceeding should be adopted which should both accomplish that result in consistency with feudal principles, and afford full and complete evidence of divestiture of the vassal and re-investiture of the superior. For this purpose, and in strict accordance with the rules of the feudal system, the process of resignation, or giving back by the vassal of his fee into the superior's hands, there to remain for ever,—*ad perpetuam remanentiam*, was adopted. This is the process of re-union or consolidation still in use. And, supposing the two fees of property and superiority to devolve upon the same person, not by purchase, but by succession,—that is, by the superior succeeding as heir to his vassal, or the vassal succeeding as heir to his superior,—the process of consolidation is equally necessary in order to the extinction of the property-fee or estate, and the vesting of both fees as one undivided estate in the same individual.

The law, or at least the practice, was long doubtful as to the necessity of consolidation in such a case as this ; and the course now in use to be followed was first seen to be necessary in the case of the vassal acquiring the superiority by succession to the superior. It was always necessary, in such circumstances, that the vassal should make up titles in his person to the superiority, as heir of the superior ; and we find, at an early period, vassals, after so succeeding and making up titles, consolidating the two fees by resigning the property into their own hands *ad remanentiam*.² But, when the superior succeeded to his vassal, the notion long entertained was, that the property-fee was consolidated with the superiority *ipso jure* ; and not only without resignation *ad remanentiam*, but even without the superior making up any title in his person to the property as heir of his vassal. An heir's title was in use to be completed by means of a precept or warrant for infeftment from his superior ; and, according to the views prevalent at the period referred to, the superior could not grant warrant for his own infeftment in the property as heir of his vassal.³ But it came to be seen that a fee of

¹ Dumber, 23d Nov. 1627, M. 570.

² Stair, ii. 11. 8.

³ B. Supplicant, 21st June 1634, M. 6917 ;
Elias, 23d July 1687, M. 3086.

irredeemable property, the titles of which had been placed on the public registers, could not be extinguished by the mere fact of the superior having succeeded to it. Such fact appeared on no register, unless a formal title was made up and recorded; and it was contrary to the principles of the system that any person should have an active right to lands without a registered title. Gradually, therefore, the view was adopted, that the superior succeeding to his vassal must obtain himself expressly infeft in the property, as heir to his vassal; and it was at length determined that the superior might, for that purpose, grant a precept for his own infeftment.¹

But when the two sets of titles were completed,—that is, when the same person was infeft in both the superiority and the property separately,—it seems to have been held, in the case of the superior succeeding to his vassal, that the *dominium utile*, or property-fee, merged in the superiority, or *dominium directum*, and was extinguished *confusione*. The notion of consolidation *ipso jure*, however, even in the case of the superior succeeding to, and being infeft in, the property as well as in the superiority, was found to lead to anomalies in practice. Among other reasons, the fees were separate and distinct estates, capable of separate destination and of being separately entailed. Thus, a superior might acquire right from his vassal to the property, by a destination different from that which regulated the succession to the superiority; and, on the superior's death, the property and superiority might come again to be separated, by devolving to different heirs. And, unless it had been held that a permanent separation must, in certain circumstances, be allowed, a strict entail of the property must have been evacuated, when the right to entailed lands fell, by succession, to a superior who possessed the superiority in fee-simple. Thus, in course of time, the doctrine was generally received, that a fee of property, even when by succession it had fallen to the superior, could be consolidated with the superiority only by a formal resignation and instrument following thereon. Mr. Duff thinks the change of view in this respect was, in some measure, occasioned by the doubts thrown out by Dirleton² as to the *ipso jure* operation of consolidation on the one hand, and the best mode of practically meeting the difficulties of particular cases on the other. At the same time, the sanction of the Court to the superior's granting warrant for his own infeftment opened the best and simplest course for solving all difficulties; and the analogy of the mode of consolidation competent when the superior acquired the property by purchase from his vassal could not be overlooked. Conveyancers came, therefore, to be satisfied that the two fees of property and superiority were to be dealt with as distinct feudal estates, until formally re-united; and practice seems to have introduced resignation *ad remanentiam* as in all cases the valid mode of effecting consolidation.

¹ Morton, 26th Nov. 1688, M. 6917; Conveyance of Land to a Purchaser, p. 328. Porteous, 28th Feb. 1757, noticed in Bell's

² Dirleton's Doubts, *voce* Consolidation.

The question, whether or not consolidation took place *ipso jure*, came fully before the Court in the case of Bald,¹ where a party acquired separately the superiority and property of certain lands. He died, and his heir made up titles to the superiority-fee only. He made up no titles to the property; but, if *ipso jure* consolidation had taken place, his titles to the superiority would have comprehended both that and the property. He then made a gratuitous entail, in favour of a stranger in blood, excluding the heir of investiture in the property. This entail was a good and valid conveyance as far as regarded lands to which the grantor had a title, and inept as to lands to which he had no title; and the question thus came to be tried, whether the title made up by the entailer to the superiority embraced the property also, to which he had made up no title, but which the disponee under the entail claimed as comprehended in the superiority titles, on the principle that the property had been consolidated with the superiority *ipso jure*. The decision was, that *ipso jure* consolidation had not taken place; and that, as titles had been made up to the superiority only, that fee only was entailed. The property, therefore, fell to the heir of the prior investiture; the entail as to that fee being inept. The decision is worthy of careful perusal. It conclusively settled the law on this important practical question. There is no *ipso jure* consolidation; and the proper form by which to effect consolidation, when the superior purchases the property from his vassal, or when the two fees of superiority and property become vested separately in one and the same person, is to resign the property-fee in the hands of the superior *ad perpetuam remanentiam*. RESIGNATION
ad remanentiam.

After these explanations in reference to the necessity of consolidation, when the property and superiority have come as separate fees into the same individual's hands, by purchase or succession, you will readily understand that the same proceeding is necessary for consolidating the two fees, though their separation has arisen solely from the particular mode in which the purchaser has made up his title. We must look to the fact of the separation, and not the cause of it. Mr. Bell, in his *Conveyance of Land to a Purchaser*,² suggests that where a disposition to a purchaser, with a *me vel de me* holding, is followed first by sasine on the precept, and then by charter of resignation on the procuratory, and by sasine on the charter, the charter of resignation and sasine thereon evacuate the previous infeftment on the disposition. But that doctrine is altogether contrary to the view now universally received and acted upon. In the case put, the sasine on the precept in the disposition contains the fee of property; the sasine on the charter of resignation contains another and a separate fee; and these two fees require to be consolidated; for which purpose the proprietor, in the character of vassal, resigns the property in

¹ Bald, 8th March 1786, M. 15,084; Ross's L. C. ii. 210, 230; affirmed, 3d April 1778.

² Bell's *Conveyance of Land to a Purchaser*, p. 344.

his own hands as superior, just as he would do if he had acquired the property-fee by succession, after he had acquired right to the superiority.

WHEN
SUPERIOR
PURCHASES
PROPERTY-FEE.

We now turn to the forms of the deeds requiring to be executed for the purpose of effecting consolidation of property with superiority, in the several cases referred to. And first, in the case of the superior purchasing the property-fee from his vassal.

In the case supposed, the superior holds the superiority, and we assume that his titles thereto are completed. He is to unite or consolidate the property purchased from his vassal with the superiority already belonging to him: for that purpose, he will obtain a disposition of the property from his vassal, the clauses of which are these:—

1, 2, 3, 4. The narrative,—dispositive,—clause conveying all right, title, etc.,—and clause declaring the term of the purchaser's entry. These are usually the same as in an ordinary disposition. The destination to heirs contained in the dispositive clause may, in some cases, be special; and we shall recur to that subject after going over the other clauses.

5. The clause of resignation follows, which, in conveyances granted according to the form annexed to the Transference of Lands Act of 1847,¹ will be,—‘And I resign the said lands and others for new infeftment.’ These, you will recollect, are the identical words of the clause, or procuratory, introduced by the same Act in the case of a disposition of lands by the proprietor to a third party, not the superior,—and where the clause or procuratory is not intended to operate consolidation, or resignation *ad remanentiam*. The objects of the clause in the two cases respectively are essentially different. In the one case (that of the disposition to a third party), the object is a resignation, or giving back of the lands to the superior, under an obligation on him to dispose them of new to such third party, and for no other purpose; the object in the other case (that of the disposition to the superior), is a resignation, or giving back of the lands to him for his own exclusive behoof, and to remain and be kept by him as his own property for ever, *ad perpetuam remanentiam*. There was much awkwardness in the use of the same form of words to express meanings so different. But the relative enactment (sect. 3) removed all difficulty as to the legal effect of the clause as it stood, and as applicable to the case we are dealing with. The Act says, ‘That the clause for resigning the lands shall be held and taken to be equivalent to a procuratory of resignation in the terms now in use; and in the case of conveyances by a vassal to his superior as equivalent to a procuratory of resignation *ad remanentiam*.’ The procuratory of resignation *ad remanentiam*, to which the short clause was thus made equivalent, used to express that the lands were held by the disponent (the vassal) of the purchaser as his superior; and that the superior was desirous that the vassal's right of property should be united and consolidated with the

¹ 10 & 11 Vict. c. 48.

superiority; the vassal, therefore, appointed

his procurators to appear before the superior, and there, by the appropriate symbols of staff and baton, to resign and surrender the lands into the hands of the superior *ad perpetuam remanentiam*, and to the effect (and this clause explains the operation of the resignation) that the right of property of the lands, which then stood in the vassal's person, might be consolidated with the superiority in the superior's person, descend to the same series of heirs, and remain inseparable therefrom in all time coming. There then followed the words of style applicable to all resignations,—giving power to the procurator to take instruments, and ratifying and confirming all that he should lawfully do in the premises.

RESIGNATION
ad remanentiam.

The awkwardness in point of form, above alluded to, has been removed by the Titles Act of 1858, sect. 5, which provides that a clause of resignation in any conveyance shall be held to import a resignation *in favorem* only, unless specially expressed to be a resignation *ad remanentiam*. But to prevent inconvenience, in cases where clauses of resignation, in the form authorized by the Act of 1847,¹ had been introduced in dispositions, with a view to resignation *ad remanentiam*, the enactment of 1858 is declared not to prevent such clauses being made use of as warrants of instruments of resignation *ad remanentiam*. In conveyances executed since the Titles Act of 1858 came into operation, however, the clause of resignation must expressly bear to be for the purpose of resignation *ad remanentiam*, otherwise it will be available for resignation *in favorem* only.

The remaining clauses of the conveyance are—

6. The assignation of writs, and relative clause of delivery.
7. Assignation of rents.
8. Clause relative to the payment of the feu-duty, casualties, and public burdens.
9. Warrandice.
- 10, 11. Registration and testing clauses.

These clauses may all be in the short form authorized by the Act of 1847;² and it does not appear necessary to make any remarks on them as applicable to this form of deed.

I return to the subject of the destination to heirs in the disposition and procuratory of resignation *ad remanentiam* by the vassal to his superior. As it is intended to unite the property-fee with the superiority, and to extinguish the property-fee by merging it in the superiority, it is not unusual to destine the property to the heirs to whom the superiority stands destinated. But it is not necessary for that purpose that the destination in the disposition by the vassal should be the same as that in the titles of the superiority. It is enough if the disposition and resignation are made to the superior. The two fees will thereby become feudally merged into one; and I apprehend that the destination in the superiority

DESTINATION
TO HEIRS.

¹ 10 & 11 Vict. c. 48, s. 3.

² *Ibid.* schedule (A).

titles will, after the resignation *ad remanentiam* takes place, regulate the succession, and be the destination applicable to the united estate of property and superiority.

ENTAILED
SUPERIORITY.

But when the superiority is held under a strict entail, and the heir of entail in possession acquires the property from his vassal, and, taking a disposition to himself, with procuratory of resignation *ad remanentiam*, proceeds with a resignation accordingly, it has been decided that the property does not fall under the fetters of the entail. It was not in the entail; neither was it a mere burden, which the resignation extinguished; and the mere resignation of the property in the hands of the heir of entail in possession will not, at least until followed by prescription, place it under these fetters.¹ In Heron's case the heir who purchased, and in Galbraith's the next succeeding heir, was found entitled to sell the property, by granting a feu-right of the same in favour of the purchaser, to be holden exactly as the original property-fee was held before the resignation *ad remanentiam* took place. In Galbraith's case the disposition of the property-fee, upon which the resignation took place, was granted to the purchaser (the superior), and his heirs or assignees. The exact terms of the destination in the corresponding deed in Heron's case are not stated in the report. But Galbraith's case does not support the view, that the property, notwithstanding consolidation, would descend to heirs different from those on whom the superiority is settled. The heir of entail who succeeded to the united or consolidated fee, in Galbraith's case, made up titles to the united fee in the same terms as if his titles had embraced, and as if he had succeeded to, the superiority alone. These titles were conceived in favour of him and his heirs of entail in the superiority; but, nevertheless, he was found to have power to give out the property again, and he was not required to make up any titles to it, separate from those containing the superiority. Indeed, it appears inconsistent with the essential character of consolidation, which is not merely the transference, but the extinction of a feudal estate, that, after consolidation of the two fees, one of these fees should be descendible to one series of heirs, and the other fee to another, by the mere operation of the law, and without any deed being granted. It is not, however, advisable for an heir of entail, on acquiring in fee-simple a feu held of himself, to consolidate the fee-simple property with the entailed superiority. If he does so, he should introduce in his consolidation titles a special declaration that he is to be at liberty to dispose of the property as freely as if he had taken the disposition thereof to himself and his heirs and assignees, and the same had been followed by infeftment or registration in ordinary form. But it is best, in such case, to take the title in ordinary form, that is, by disposition to the heir of entail and his heirs and assignees, containing expressly or by implication alternative manner of holding, and procuratory of resignation, and to register the disposition, so as to exclude all possibility of

¹ Heron, 27th April 1733, 1 Paton's App. 98; Galbraith, 14th Jan. 1814, F. C.

difficulty or trouble in connexion with the entail. Heron's and Galbraith's cases show that a fee of property not contained in the entail, but purchased by an heir of entail, and consolidated with the entailed superiority, can be re-issued by the purchaser or a succeeding heir of entail, notwithstanding the consolidation with the superiority.

RESIGNATION
ad remanentiam.

Where parties are dealing with a proper real burden on an entailed estate, special care is required to preserve the right to re-issue the burden, if such right be desired. An heir of entail in possession had created a proper real burden on his entailed estate by a wadset right, granted under powers in the entail; a succeeding heir of entail, who was under no obligation to redeem the wadset, exercised his right of redemption, and thereupon took an unconditional discharge and renunciation thereof in favour of himself and his heirs of entail, with procuratory of resignation in favour of himself and said heirs *ad remanentiam*, which was followed by instrument of resignation in due form. In these circumstances, it was held that the burden was extinguished, and that the wadset-right could not be re-issued by the heir who redeemed it.¹ The heir of entail who redeemed the wadset should have taken a disposition and assignation thereof to himself and his heirs and assignees, and should not have consolidated.

The disposition with procuratory of resignation *ad remanentiam* contains no obligation to infest, or precept of sasine. These clauses are inconsistent with the object of the procuratory, which is to extinguish a fee; whereas the obligation to infest and precept of sasine have in view the creation or transference of a fee in favour of a new vassal, in order to being kept up as a separate and subsisting fee.

The mode of proceeding to complete the title of the superior to the property-fee, which he has acquired, has been subjected to successive alterations by the Infestment Act of 1845, the Transference of Lands Act of 1847, and the Titles Act of 1858. Before the first of these Acts came into operation, an act of resignation had to take place, and be followed by an instrument of resignation *ad remanentiam*, which was recorded in the register of sasines. At the period in question, such act of resignation could take place only in presence and in the hands of the superior, or of his commissioner appointed by regular and formal deed and having special powers to receive resignation *ad remanentiam* for the superior. But by the Act of 1845, sect. 8, the superior's known agent for the time (a party not usually holding any special commission), and whom the Act does not require to have any commission, was authorized to accept the resignation for the superior. The proceeding was as follows:—A person acting as procurator for the vassal appeared before the superior or his commissioner, or known agent for the time, in presence of a notary-public and two witnesses. The procurator took the disposition, containing the procuratory, into his hands, and in virtue thereof resigned the lands in the hands of the superior *ad remanentiam*, by delivering to

¹ Wauchope, 14th Dec. 1815, F. C.; affirmed 9th March 1825, 1 Wil. & Sh. App. 41.

REGISTRATION
OF INSTRUMENT
OF RESIGNA-
TION *ad re-
manentiam*.

By the Act 1669, cap. 3, the registration of instruments of resignation *ad remanentiam* is required within sixty days after their date, under pain of nullity. This enactment remained in force until the Act of 1858 came into operation; and, as in the case of instruments of sasine in the old form, instruments of resignation in the old form could be recorded at any time within the sixty days, though the party should have died previously to the registration. But, by the Titles Act of 1858, instruments of resignation *ad remanentiam*, in the form thereby authorized, can be recorded at any time during the life of the party in whose favour the resignation is made; and the date of presentment and entry, set forth on any instrument of resignation in such form by the keeper of the register, is declared to be the date of the resignation and of the instrument. The registration of the procuratory, or conveyance, or notarial instrument, can take place at any time during the life of the party on whose behalf they are presented for registration, by sect. 19 of the Act of 1858; and, in other respects, the registration of the procuratories, conveyances, and instruments, in reference to resignation *ad remanentiam*, is, by the Act, placed on the same footing with the registration of conveyances and notarial instruments as equivalents to sasine.

In order that the resignation may be valid, it appears to be essential that the superior's titles of the superiority, and the vassal's of the property, shall be completed during their respective lifetimes.¹ They are not feudally superior and vassal, respectively, without complete titles in their persons. It is not, however, a mid-impediment to resignation *ad remanentiam* in the hands of the fiar of the superiority that the superiority is held by a liferenter; nor does resignation, in such case, in the hands of the fiar, restrict the right of the liferenter in the superiority.² At the same time, it is desirable to avoid resignation *ad remanentiam* in the hands of the fiar when the superiority is in the hands of a liferenter; lest the liferenter should thereby acquire a claim to the liferent of the property lands resigned, and not be restricted, as before the resignation, to the liferent of the superiority merely.

The conveyance with express clause of resignation *ad remanentiam*, when followed by registration, or by instrument of resignation, or notarial instrument duly completed and recorded, divests the vassal and invests the superior; just as in the ordinary case a disposition followed by registration, or instrument of sasine, and by confirmation, divests the disponer and invests the disponent. But the resignation *ad remanentiam* is not merely a transference of the vassal's estate to the superior,—it is an extinction of it as a separate estate. The subaltern right, as such, is to all intents and purposes extinguished, and cannot be transmitted by succession or ordinary conveyance. It may indeed be revived by a new constitution,—as shown in Heron's and Galbraith's cases,—that is, by the granting of a new charter; but feudally that is a mode of creating a new estate, not properly of transmitting an old estate. Lord Stair says on

¹ Grant, 22d Feb. 1760, M. 8740.

² Dundas, 26th May 1812, F. C.

this subject,¹ 'Infeftments are extinct by consent, by resignation made by ' the vassal, who stands infeft in the lands, to his superior, *ad perpetuam remanentiam*;' 'for, in the same way that their constitution was perfected by an instrument of sasine, their destitution is consummated by ' an instrument of resignation.' The view, that resignation is not a mere transference, but a positive extinction of the subaltern right, is strongly illustrated by a case where a vassal, who had right by his charter to relief from his superior of minister's stipend, resigned his feu *ad remanentiam* in the superior's hands. This was done in connexion with proceedings for creating a vote under the old system of electing Members of Parliament in Scotland. After that object was served, the vassal re-acquired the property of his feu by a new feu-charter; in which, however, the superior's obligation for relief of stipend was not repeated. The original title was held to be so completely extinguished, that the vassal could not revert to it in support of a claim of relief from stipend; and the vassal was found no longer entitled to such relief at the hands of his superior.² But the extinction operated by resignation *ad remanentiam*, being the result of a voluntary act to which both the superior and the vassal are parties, has different consequences, with respect to the superior, from the judicial extinction incident to feudal relations. The latter is a legal forfeiture, arising from the vassal's non-fulfilment of the conditions on which the feudal estate was originally given out by the superior; and, when such forfeiture takes place, the entire estate falls to the superior, just as he himself gave it out, and without regard to the rights of sub-vassals, tenants, creditors, or others. The extinction arising by resignation *ad remanentiam* is subject to all the burdens lawfully imposed by the vassal prior to the resignation; and, moreover, the right resigned can be validly affected with a reserved real burden, which may be rendered effectual by a power of sale attached to the reservation.³

Procuratories of resignation *ad remanentiam* do not fall by the death of the parties, or either of them.⁴ But instruments following thereon, after the death of either party, must, under the sanction of nullity, deduce the connecting titles of the party using the procuratory.

We now come to the case of the superior succeeding to his vassal, or the vassal to his superior. In either of these cases, titles must, in the first place, be completed in common form, by the party succeeding as heir to his predecessor. Having made up titles in the character of heir to the estate or fee to which he has succeeded, and having likewise made up titles to the other fee or estate, the party, as vassal, resigns the property in his own hands as superior *ad remanentiam*. For that purpose, we have, before the Titles Act of 1858 came into operation,—(1.) A procuratory of resignation by the party in his own favour, narrating that he

WHEN
SUPERIOR
SUCCEEDS TO
PROPERTY, OR
VASSAL TO
SUPERIORITY.

¹ Stair, ii. 11. 1.

affirmed, 15th April 1824, 2 Sh. App.

² Walker's Representatives, 28th June 1839, 1 D. 1132.

162.

³ Fraser, 13th Feb. 1822, 1 Sh. 316,

⁴ 1693, c. 35.

is heritable proprietor of the lands, holding the same of himself as superior, and that he is desirous of uniting and consolidating the property with the superiority. He therefore grants procuratory of resignation *ad remanentiam* in his own favour; the terms of which are similar to those of the procuratory in the old form, contained in the disposition by a third party, vassal, to his superior. There is no short form available for the simple procuratory, when granted independently of a disposition. (2.) This procuratory was followed by instrument of resignation *ad remanentiam* in ordinary form, which required to be registered within sixty days of its date. After the Titles Act of 1858 came into operation, the registration of this procuratory, with warrant of registration thereon, was made equivalent to expeding and recording an instrument of resignation *ad remanentiam*.

WHEN VASSAL
PURCHASES
SUPERIORITY.

The proceeding is exactly the same when the vassal purchases the superiority; and likewise when, by the mode of making up titles, separate fees of property and superiority have been constituted. In each case, as soon as the titles of the two fees respectively are completed in the person of the proprietor, such party, as vassal, grants procuratory of resignation *ad remanentiam* in his own favour, as superior; and either expedes and records instrument of resignation *ad remanentiam* thereon, or records the procuratory, with warrant of registration thereon. Thereupon the two fees are one, the superiority-title being the ruling investiture as regards the destination and right of succession.

Resignation *ad remanentiam* is competent only by the vassal in the hands of his immediate superior. If there are three fees, the lowest fee cannot be resigned in the hands of the superior of the highest fee, passing by the intermediate fee. And, moreover, if the fee to be resigned is held in virtue of a disposition with alternative holding, followed by registration or sasine, the resignation will not be valid, unless the superior shall interpose his confirmation to the disposition so registered, or followed by sasine. Without such confirmation, the lands, or at least the property-fee, will be held not immediately of him, but immediately of the disposer, in terms of the obligation to infeft *de me* contained in the disposition.

When the interests in the property and superiority are identical, it is a good general rule to have them formally united by resignation *ad remanentiam* without unnecessary delay. But union can be accomplished by prescription, as well as by formal resignation *ad remanentiam*. We have seen that uninterrupted possession, during the period of the long prescription, upon a title *ex facie* good and valid, operates to make such title unexceptionable, although originally, that is, at the commencement of the prescriptive period, it may have been wholly inept. On the same principle, the superiority-title, when expressed as containing the lands, will become a good title of the lands, both property and superiority, after both fees or estates have been possessed for the full prescriptive period on such superiority titles only.¹ The right of the superior is, *ex facie*, a right to the lands, simple and absolute—a title to the lands,

PRESCRIPTION.

¹ Middleton & Paterson, 22d Dec. 1774, M. 10,944.

tanquam optimum maximum ; and when he, in virtue of his infeftment of the lands, has had full possession of the *dominium utile* for the space of forty years, without any challenge or interruption, the vassal's right is thereby totally at an end. The superior's possession of the *dominium utile* for the space of forty years, in virtue of his title *ex facie* to the lands, is as effectual for extinguishing the right of the vassal, as a resignation made by the vassal *ad remanentiam*.

The superior may even acquire, by prescription, part of the property-fee expressly contained in his vassal's subsisting infeftments.¹ In Middleton's case, the right against which prescription was held to run was in a third party ; and, where third parties are concerned, prescription may run so as to extinguish an adverse fee of property, though the possession is as heir-apparent only in the superiority-fee.² But, even where no third party is concerned, the possession of both property and superiority, under complete feudal titles to the superiority (*ex facie* the lands), for forty years, will extinguish the fee of property.³ And though, in general, a party having two rights to the same lands—the one limited and the other unlimited—will be presumed to possess under the unlimited, as the title most favourable to himself, that is only a presumption ; and, where the superiority-titles (containing *ex facie* the lands) were limited, and those of the property were unlimited, but the circumstances were such as to connect the possession with the limited titles, the right of property was held to be extinguished, and brought by consolidation with the superiority validly and effectually under the limited title.⁴ This rule, however, does not extend to the case of a party on whom lands have been settled by a marriage-contract, or other settlement, with a particular destination, but free of limitations, and who is also heir under the older investiture, with a different destination, likewise free of limitations. This is a proper case of double titles to the same lands. In this case, supposing the party and his heirs to make up their titles in terms of the older destination, leaving the marriage-contract or other special settlement personal and unfeudalized, they will not be held to have abandoned and extinguished the right under the marriage-contract or special settlement ; and heirs under that deed will succeed in preference to those called by the older investiture, when a divergence takes place.⁵

We now proceed to consider the modes in which, under various Statutes, rights of superiority may be sopited for a time, or even permanently. SOPITED
SUPERIORITY.

The earliest enactment on this subject is that of 1474, cap. 57, by

¹ Lord Cringletie in Aytoun, 4th June 1833, 11 Sh. 676.

² Waddell, 19th June 1828, 6 Sh. 999.

³ Wilson, 29th Nov. 1839, 2 D. 159.

⁴ Elibank, 21st Nov. 1833, 12 Sh. 74. The same doctrine was applied in the case

of Bontine, 2d March 1837, 15 Sh. 711 ; affirmed 6th Aug. 1840, 1 Robinson's App. 347.

⁵ Gray, 30th June 1752, Ross's L. C. ii. 577, & iii. 531 ; Zuille, 4th March 1813, F. C.

which superiors who had not completed their own titles by infestment, and therefore were not in a situation to enter their vassals, could be charged by such vassals to obtain themselves infest in the superiority within forty days, under certification that, in case of failure, they should 'lose the tenant for his lifetime;' that is, as Erskine says,¹ 'lose the casualties that may fall to him (the superior) through the act or delinquency of his vassal.' The superior was further to make up the damage that might be sustained by the vassal through such failure. The forfeiture in this case was for the vassal's, not the superior's, lifetime.² But the superior, though he failed to obtain himself infest in the superiority, did not forfeit any of the fixed yearly duties payable by the vassal, these not being properly casualties. Supposing the immediate superior to make up no title, the vassal was then entitled to obtain, in the Court of Session, a decree of declarator of tinsel of the superiority against such superior, and to charge the next immediate over-superior to give him an entry, *supplendo vices* of the superior first charged; and so on, the vassal could proceed upwards from superior to superior until he reached the Crown, against whom charge was neither necessary nor competent. But, before giving the charge to the immediate superior, the vassal, when he was the heir of the last vassal, required to instruct his own title, by expeding a special service as heir of his predecessor.³

These forms, as you will readily perceive, were very cumbrous, tedious, and expensive. They were consequently but little resorted to; and, where the estate of superiority was of trifling value, great inconvenience came frequently to be experienced by the proprietors of lands, because superiors would not incur the expense of making up their titles; and, as the law stood until 1847, proprietors, in many cases, were unable to obtain titles without the interposition of their superiors.

FORFEITURE.

An improvement on the system was first applied by the Transference of Lands Act of 1847.⁴ By sect. 8, power is given to every heir, disponent, adjudger, or other party who would have been entitled to compel his superior (if infest in the superiority) to grant him an entry, to obtain the absolute forfeiture of the right of superiority, if the annual *reddendo* attached thereto should not exceed £5 sterling in value or amount. For this purpose, the party is to present a petition to the Lord Ordinary on the Bills,⁵ setting forth the nature of his own title; that his author held the lands of the superior named for an annual *reddendo* not exceeding in value or amount £5 sterling; that the superior has not made up his title; and praying for an order on him to make up titles to the superiority, and to infest the petitioner in the property; with certification to the superior that, in case of failure, he shall forfeit the superiority. The petition further prays the Lord Ordinary, in the event of the superior's failure to complete a title, or to show reasonable cause for delay or re-

¹ Erskine, iii. 8. 80.

² Dickson, 1st July 1802, M. 15,024.

⁴ 10 & 11 Vict. c. 48.

³ See Dickson's case; Erskine, *ut supra*, note 523; Jurid. Styles, iii. 182.

⁵ Schedule (E), No. 1.

fusal, to declare that the superior has forfeited his right, and that the petitioner is entitled in all time coming to hold the lands *of* the next over-superior, by the tenure and for the *reddendo* by and for which the forfeited superiority was held. The Lord Ordinary is thereupon to grant warrant of service,¹ and, on expiry of the *inducias*, and in case of failure on the superior's part to obey the charge, to declare the forfeiture, and otherwise to find in terms of the prayer of the petition.² The Lord Ordinary's decree, when extracted and recorded in the register of sasines, is declared to operate the absolute extinction of the right of superiority, and to enable the petitioner to apply to the next over-superior for an entry in the property.

In the renewed investiture to be granted for completing such entry, the *tenendas* and *reddendo* contained in the title-deeds of the forfeited superiority are to be inserted,—not those contained in the investiture of the petitioner's predecessor (the deceased sub-vassal),—and the lands are to be held by the petitioner according to the tenure of the forfeited superiority. In this way, the over-superior just exchanges his immediate vassal for his sub-vassal, or rather takes the sub-vassal in the exact room and place of the immediate vassal.

Where the annual *reddendo* exceeds £5 in amount or value, or, in the option of the petitioner, whether such *reddendo* exceeds £5 or not, it is competent to apply by petition as above; and the superior, if he shall not complete titles and grant entry as required, is declared, for himself and his heirs, to forfeit all right to the dues and casualties payable on the entry of the petitioner, who is entitled to retain his feu-duties or other annual prestations until fully indemnified for all expenses of his petition, procedure thereon, and making up his title. The Lord Ordinary is to pronounce interim-decree to that effect, and grant interim-warrant for an entry to the petitioner, from the Crown or Prince of Scotland; or, in the petitioner's option, from the mediate over-superior. Such entry, if obtained from the Crown or Prince, is to be applied for, as in the case of ordinary Crown charters or precepts, in terms of the Crown Charters Act of 1847; and the charter obtained is declared as effectual as if it had been granted by the mediate over-superior when infest in the superiority. And, 'when there is a mediate over-superior,' the petitioner, in his option, can charge him to grant the required entry, as *in vice* of the immediate superior.

In the case last stated, the immediate superiority is not forfeited absolutely; the lands are holden of the Crown or Prince, or the mediate superior, as *in vice* of the unentered immediate superior, only so long as such superior and his successors remain unentered, and thereafter, until a new entry in favour of the vassal or his successors shall become requisite. But it is competent for the unentered superior,—and whether the *reddendo* be of the annual amount or value of £5 or not,—at any time before expiry of the days of charge, or before interim-decree shall have

¹ Schedule (E), No. 2.

² Schedule (E), No. 3.

MINUTE OF RELINQUISHMENT.

been extracted, to relinquish the right of superiority which he holds in favour of the petitioner, by minute, in form of schedule (G), No. 1, attached to the Act; and if the petitioner, by himself or his counsel, subscribes or indorses upon such minute an acceptance of the relinquishment, in the form of schedule (G), No. 2, the Lord Ordinary will interpose his authority to the minute and acceptance, and declare the relinquished right of superiority extinguished, to the effect of making the petitioner and his successors hold as vassals immediately of the superior of the relinquished superiority, in permanency, and by the tenure, and for the *reddendo*, by and for which the relinquished superiority was held. The decree, when extracted and recorded in the appropriate Register of Sasines, entitles the petitioner to apply for an entry from such superior accordingly, as his immediate superior. In this case, the immediate superiority is absolutely extinguished, and there is the same provision as to the terms of the *tenendas* and *reddendo* in the renewed investiture, as in the case of the absolute forfeiture of the immediate superiority, provided for by section 8. But it is entirely optional to petitioners—that is, the sub-vassals—to accept or refuse relinquishment of superiority when offered.

It is further provided (sect. 12), that the investiture thus completed upon forfeiture or relinquishment shall, in all respects, be as effectual as if the heir in the superiority had completed his titles, and conveyed the said superiority to the petitioner, and the latter, after completing his titles to said superiority, under the over-superior, had resigned *ad remanentiam* in his own hands. Forfeiture or relinquishment are thus equivalent to the acquisition, by a sub-vassal, of the immediate superiority of his lands, and consolidation of the sub-fee with the immediate superiority.

It is further provided (sect. 13), that, in the case of forfeiture or relinquishment by an apparent heir, the vassal obtaining or accepting the same shall be liable (subject to retention of expenses as aforesaid) for the value of the superiority to the apparent heir. But such forfeiture or relinquishment is not to infer a passive representation on the part of such heir, nor any liability for the debts of the person last infeft, beyond the price, if any, which the heir may receive for such forfeiture or relinquishment. And forfeiture or relinquishment of superiority is to be competent, notwithstanding that the superiority forms part of an entailed estate, and is not to infer contravention of the prohibitions of the entail; but the price or value of the superiority, if any, is to be applied in conformity with the provisions of the Lands Clauses Consolidation (Scotland) Act, 1845,¹ in reference to the disposal of money arising from the sale of part of an entailed estate. On the other hand, when the sub-fee is entailed, the price or value paid for the relinquished superiority, is to be taken as entailer's debt; and so to form a charge on the estate, in favour of the vassal who advances the amount.

The Titles Act of 1858, sect. 23, simplifies the procedure in the case

¹ 8 & 9 Vict. c. 19.

of relinquishment of superiority; making it competent to any subject-superior, whether himself entered or not, to relinquish his superiority in favour of his immediate vassal, without any judicial proceedings, but by merely granting a deed of relinquishment, which is to the same effect as the decree of the Lord Ordinary authorized by the Act of 1847.¹ This DEED OF RE-
LINQUISHMENT. relinquishment can be accepted by the vassal, by an acceptance in the shortest and most simple form, written on the deed of relinquishment; and the relinquishment and acceptance being produced to the over-superior, and there being paid or tendered to him such duties and casualties as may be exigible by him, he is bound to enter the sub-vassal as his immediate vassal, by writ of investiture, in the form of WRIT OF
INVESTITURE. schedule (N), No. 3, to be written on the deed of relinquishment. In this writ, the *tenendas* and *reddendo* contained in the titles of the relinquished superiority are to be inserted, in room of those contained in the former investiture held under the relinquished superiority.

On the writ of investiture, with the deed of relinquishment and acceptance, being thereafter recorded in the appropriate Register of Sasines, the relinquished superiority is extinguished, and the vassal and his successors hold the lands as immediate vassals of the over-superior, by the tenure and for the *reddendo* by and for which the relinquished superiority was held. And, in like manner as in the case of the forfeiture or judicial relinquishment, under the Act of 1847, the investiture completed on the extra-judicial relinquishment, authorized by the Act of 1858, is declared to be as effectual as if the granter of the deed of relinquishment had completed his title to the superiority, and had thereafter conveyed the same to the vassal; and the latter, after having completed his title under the over-superior, had resigned *ad remanentiam* in his own hands.

But neither under the Act of 1847 or that of 1858 is the investiture so completed in any respect to extend the right or interests of the over-superior, who is to be entitled to no more than the duties and casualties, taxed or untaxed, to which he would have been entitled if the party forfeiting or relinquishing had remained his vassal.

In this case, equally as in that authorized by the Act of 1847, passive representation is guarded against (sect. 23). And provision is made (sect. 25) for the case of the relinquishment of entailed superiorities, and for the disposal of the price thereof; and, where the sub-fee is entailed (sect. 26), for charging the price paid by the heir of entail for a relinquished superiority upon the entailed estate.

The proceedings authorized by these Acts, especially by that of 1858, operate a great improvement on the system, in connexion with the difficulty to be overcome through a superior refusing to make up his title. And the want of a title in the person of the immediate superior can very seldom now be found to create a practical difficulty in reference to the titles to a sub-fee.

¹ 21 & 22 Vict. c. 76, Schedule (N), No. 1.

CHAPTER VII.

BURGAGE. I WILL conclude the subject of the voluntary transmission of lands to singular successors by explaining the forms applicable to the case of lands held by burgage tenure.

The Titles Act of 1858 does not apply to these,—this being expressly so declared by sect. 35; but the Act of 1860¹ applies to them.

The tenure of burgage (called by Craig² *feudum burgale, sive plebeium*) is defined by Erskine, that by which ‘royal boroughs hold of the Sovereign ‘the houses and lands that lie within the limits described in their several ‘charters of erection.’ The first constitution of a royal burgh is by charter of erection from the Crown, by which the subjects erected into the royal burgh, and the privileges to be enjoyed by the burgh, are bestowed. And a charter confirming ancient rights is effectual without sasine, if the old rights were dated at a period when a grant with possession without sasine was equivalent to the modern grant and sasine.³ The royal burgh’s right needs no renewal from the superior: the vassal being a community, which never dies. When it happened that a royal burgh was erected within a territory held in whole or in part of a subject-superior, the rights of such superior were reserved entire in the erection.⁴ But, even in these cases, the whole privileges and liberties of the burgh, whether applicable to the lands held of the Crown or subject-superiors, are held of the Crown.

Burgage-holding, as was formerly stated, was introduced for the benefit of the trading community, who were under the necessity of betaking themselves to towns for the convenience of trade, as well as to guard against the dangers incident to the feudal system; and Craig describes it as compounded of military or ward-holding, and some other which he does not designate, but which included the service of watching and warding; and these services are incident to this tenure, and are due within the liberties of the burgh, whether expressed in the charter of erection or not.⁵

Although it is clear and undoubted that the proper burgage lands are held of the Crown, authorities are not at one on the question, whether, during the subsistence of the burgh, the burgh itself, or each individual burgh proprietor, is vassal of the Crown. Sir Thomas Hope⁶ appears to hold that each proprietor is properly a burgess, as possessing part of the common property; and Professor Menzies⁷ adopts that view on the authority of the Act 1567, cap. 27, by which the bailies of the burghs are the Crown’s bailies for giving sasine of lands within burgh; and also on the authority of the case of Aytoun, before referred to, and

¹ 23 & 24 Vict. c. 143.

² Craig, i. 10. 31.

³ Aytoun, 4th June 1833, 11 Sh. 766.

⁴ Erskine, ii. 4. 8

⁵ Craig and Erskine, *ut supra*.

⁶ Hope’s Minor Practicks, tit. ix. s. 16.

⁷ Menzies, p. 834.

other cases. Sir George Mackenzie, on the other hand, holds¹ that the burgh is the vassal, and not each individual burgh proprietor; and Mr. Duff concurs with Mackenzie.² Mr. Duff's view is, that the corporation, or whole town as a body, is the vassal; that the individual burgesses hold of the Crown only as members of the corporation; and that the particular titles which each has to his share of the common subject may be regarded as evidencing his right in questions with the corporation or its other members, not as rights constituting in each member a separate vassalage or estate. These latter views appear supported by the fact that after a burgh is suppressed, and there is no longer a corporation, the burgh proprietors individually hold of the Crown as their superior, and by the same burgage tenure as before; and heirs and singular successors complete their titles by charter or precept from the Crown.³ But, while the burgh subsists, entry by the Crown, in favour of an individual burgh proprietor in lands held burgage, is incompetent. A posterior right granted by the magistrates is preferable to one of prior date flowing from the Crown.⁴

As regards the modes of transmitting property within burgh to individuals, the town-council appear, by custom, to have acquired the right, in their option, of making grants to be holden of themselves as superiors in feu-farm;⁵ and, after the relations of superior and vassal are once duly constituted between the town-council and those acquiring from them, the mode of procedure for transferring the property so held is the same as that applicable to property held in feu-farm of any other superior. It would seem, however, more in accordance with the Act 1567, cap. 27, that the town-council should make grants of lands, within the proper burgh, to be held of the Crown by burgage tenure; because, when the holding is of themselves in feu-farm, the Act does not apply. No individual burgh proprietor, however, can make a grant of his own lands by subinfeudation, so as to create a sub-vassalage holden of himself; and there can be no infeftment of an individual proprietor's lands by confirmation. The only mode and form of entry, in the case of transmissions by individual proprietors, is by resignation for new infeftment in favour of the disponent of the last proprietor, or its equivalent. Such resignation, when it takes place, is made in the hands of one of the bailies of the burgh,—not because the town-council are superiors (which they are not), but because they represent the Sovereign, who only is the superior. And the bailies act in the same way, even when the burgh itself makes an original grant of burgh lands to be held burgage. In that case, the town-council act as proprietors in disposing the lands, and the bailies act in the separate capacity of representatives of the Crown, in receiving resignation from themselves as proprietors. Formerly they granted new infeftment to their disponent;⁶ and it is still competent for

FEU WITHIN
BURGH.

¹ Mackenzie's Institutes, ii. 4. 9.

² Duff's Feudal Conveyancing, p. 50.

³ Urquhart, 17th Jan. 1758, M. 15,079.

⁴ Countess of Kincardine, Feb. 1686, M. 6894.

⁵ Erskine, ii. 4. 9.

⁶ Duff, p. 50.

DISPOSITION
OF BURGAGE
PROPERTY.

them to do so. But sasine is no longer necessary; the Titles Act of 1860 having given to registration of the conveyance, with warrant of registration thereon, in the appropriate register of sasines, the same effect as if resignation had taken place, and sasine had been passed thereon.

The modern form of the disposition of burgage property is regulated by schedule (A), annexed to the Transference of Burgage Lands Act of 1847.¹ The clauses, down to the obligation to infeft, are to be framed according to the rules applicable to the disposition of proper feudal subjects.

The obligation to infeft, if expressed, can be only to be holden of the Crown in free burgage. The words of this clause, in the schedule, are, 'And I oblige myself to infeft the said B., to be holden of her Majesty in free burgage,' which, by sect. 2 of the Act, imports an obligation to infeft to be so holden 'for service of burgh used and wont.' But, by the Titles Act of 1860, sect. 6, it is declared not necessary to insert an obligation to infeft in any conveyance of lands to be held burgage.

We have next, in conveyances before the Titles Act 1860 came into operation, the clause, or procuratory, of resignation,—'And I hereby resign the said lands and others, in favour of the said B., and his fore-saids, for new infeftment.' This clause also is declared unnecessary by the section of the Act above specified.

We have then an obligation 'to free and relieve the disponee of all cess, annuity, ground-annual, and other public and parochial burdens,'—corresponding to the obligation to relieve the disponee of all feu-duties, casualties, and public burdens, contained in the disposition of feudal subjects.

Next, the assignation to rents, in these words,—'And I assign the rents of the said lands.'

Then the assignation to writs,—'And I also assign the writs and evidents, and have delivered the same according to inventory.'

The warrandice clause,—'And I grant warrandice as accords.'

And, lastly, registration and testing-clauses.

In several respects, both as regards the arrangement of the clauses, and their verbal expression, the statutory form of disposition applicable to burgage lands is different from that applicable to proper feudal subjects. And, though these differences are not in essentials, the statutory form should be carefully observed, in order to mark accuracy of practice. The disposition of lands to be held by burgage tenure contains no precept of sasine; as in such case both subinfeudation and entry by confirmation are incompetent.

Of the disposition in use before the Act of 1847 came into operation, a form will be found in the Style Book.² The clauses correspond with those in the short statutory form; but, after the full explanation of these given in connexion with the disposition of proper feudal subjects, it is unnecessary to enter into any detailed examination of

¹ 10 & 11 Vict. c. 49.

² Juridical Styles, i. 604, 3d edition.

the burgage clauses here. The relative import is the same in both cases.

The mode of completing titles, in virtue of a conveyance of lands to be held burgage, has undergone changes similar to those applicable to the case of subjects to be held by feudal tenures. The form, prior to the operation of the Infestments Act of 1845, was as follows :—Upon delivery of the conveyance by the former to the new owner, the procurator, thereby constituted by the disponent, appeared in presence of one of the bailies of the burgh, as representing the Crown (the superior), on the ground of the lands, and there resigned the lands by staff and baton, which were the only authorized symbols.¹ The lands were so resigned in the hands of the bailie, as in the hands of the Crown, for new infestment, to be granted by the bailie, as such representative, to the new proprietor. The bailie thereupon, as representative foresaid, forthwith gave sasine of the lands to the new proprietor, by delivering to him, or to the procurator, *as now acting for him*, the appropriate symbols of earth and stone. In some burghs, the hasp and staple of the door, where there was a tenement of houses, were also taken hold of by the disponent infest; but more generally not so. The whole ceremony was begun and concluded on one and the same occasion, and certified in a single deed, called an instrument of sasine, but, more properly, of resignation and sasine; an instrument which, as Mr. Duff says, combined the effects of the instrument of resignation *in favorem* and the charter of resignation and sasine of ordinary conveyancing, and bore a striking resemblance to the ancient *breve testatum*.²

COMPLETION OF
DISPONENT'S
TITLE.

INSTRUMENT OF
RESIGNATION
AND SASINE.

The above mode of giving infestment, in the case of burgage holdings, was prescribed by the Act 1567, cap. 27, already cited, which ordained that none should officiate except the bailies and town-clerks; and accordingly, before the Titles Act of 1860 came into operation, instruments of sasine of burgage lands required in all cases to be prepared by the town-clerk as notary.³ But, by the Act of 1860, sect. 21, no town-clerk of any royal or other burgh in Scotland, appointed subsequently to 8th March 1860, has any exclusive right or privilege of preparing any instrument of sasine applicable to land. In the case of such town-clerks, therefore, instruments of sasine of lands held by burgage tenure can be expedite with equal freedom as in the case of instruments of sasine of feudal subjects; and the privilege enjoyed by older town-clerks of passing infestments within burgh arises by Statute, and is peculiar to clerks of royal burghs. The clerk of a burgh of regality cannot acquire a similar privilege by custom.⁴ When sasine had to be given to the town-clerk himself, the Court of Session were in use to grant warrant to the Sheriff-Clerk of the county, or some

BY WHOM
PREPARED.

¹ Act of Sederunt, 11th Feb. 1708; Carnegie, 2d Dec. 1729, M. 14,316.

² Duff, p. 510.

³ This rule was recognised in Dawson,

14th Nov. 1827, 6 Sh. 19; affirmed 31st March 1830, 4 Wil. & Sh. 81.

⁴ Magistrates of Edinburgh, 2d Feb. 1814, F. C.

one else, to act as the town-clerk *pro hac vice* in expediting the instrument.¹ But the town-clerk can now, officially, expedite and record an instrument of sasine in which he is personally interested, either individually or as trustee for another, or otherwise;² and no instrument expedite and recorded, either before or after the passing of said Act, is challengeable by reason of personal interest in the town-clerk or keeper of the register by whom the same has been expedite and recorded.³

GIVING OF
SASINE.

When a royal burgh was without magistrates, the Court were in use to appoint particular parties with special power to give infeftment in burgage lands. Thus, during the Rebellion in 1745, when Edinburgh was for a time without magistrates, the Court appointed certain parties as bailies for the express purpose of receiving resignations and giving sasines until a new magistracy should be established in due course of law. More lately, the usual course was for the Court to appoint managers for the burgh, with special power to receive resignations and grant infeftments until the corporate rights should be restored.⁴ But the interposition of magistrates was rendered unnecessary by the Sasines Act of 1845,⁵ which, though allowing the form of burgage sasines to be continued as before, except that the use of the long notarial docquet was abolished, made it lawful to give delivery of sasine, either on the ground of the lands as formerly, or within the council chamber of the burgh by delivery of a pen; and the Transference of Burgage Lands Act of 1847⁶ did away the necessity of appearing before a bailie, or resigning the lands, or going to the ground of the lands, or to the council chamber, or using any symbol of resignation or sasine. Resignation and sasine upon a disposition were thereby made competent by presenting the warrant to the town-clerk, being a notary, and by his giving sasine of the lands by subscribing and recording an instrument of sasine in the abbreviated form contained in the schedule (D) annexed to the Act, sect. 5. Now, by the Titles Act of 1860, any notary-public can do what could formerly be done by the town-clerk only, in all cases where the town-clerk was appointed after 8th March 1860.

This schedule appointed the notary to prefix his motto to his subscription; which was usually done in all sasines, but was not prescribed by the Sasines Act of 1845 as to sasines of proper feudal subjects. The schedule annexed to the Burgage Act of 1847 also said, in a note, that the notary was to sign 'according to the present practice,' and that the witnesses were to sign on the last page only; which excluded, as to burgage sasines, a doubt which had been to some extent felt in connexion with sasines of proper feudal subjects, viz., whether the witnesses ought to sign each page, or the last page only.

Instruments of resignation and sasine of burgage lands, when such are expedite, require to be registered in a particular register of sasines

¹ Duff, 16th Jan. 1823, 2 Sh. 117.

² 23 & 24 Vict. c. 143, s. 26.

³ *Ibid.*

⁴ Philp, 18th Jan. 1832, 10 Sh. 199.

⁵ 8 & 9 Vict. c. 35.

⁶ 10 & 11 Vict. c. 49, s. 5.

kept by the town-clerks for the burghs respectively.¹ In certain burghs some irregularity crept in as to recording the docquets, which was done in an abbreviated form only; and the Act 10 Geo. IV. cap. 19, whilst it sustained instruments imperfectly registered in that respect previously, required that in future the notarial docquet should be recorded at length, under pain of nullity. The docquet, however, was abolished by the Act of 1845, as already mentioned.

The mode of completing real rights to burgage lands remained un-
REGISTRATION
OF CONVEY-
ANCE.
 altered from the passing of the Burgage Lands Transference Act of 1847 until 1st October 1860, when the Titles Act² came into operation. By the last-mentioned Act provisions were made in reference to the completion of the titles to burgage lands, similar to those of the Titles Act of 1858 in reference to feudal subjects. Thus, by sect. 3 of the Act of 1860, it is declared not necessary to expedite and record an instrument of sasine, or of resignation and sasine, on any conveyance of lands held burgage, but competent and sufficient for the person in whose favour the conveyance is granted, instead of expediting and recording such instrument, to record the conveyance itself in the appropriate register of sasines. The conveyance is appointed to be presented for registration, with warrant of registration thereon, in the Form No. 1 of schedule (A), annexed to the Act, specifying, as in the case of the warrant applicable to conveyances of feudal subjects, the person on whose behalf it is presented, and signed by such person, or his agent. And the conveyance, being so presented and recorded along with such warrant, is declared to have the same legal force and effect, in all respects, as if resignation of the lands had taken place in due form, and as if the conveyance had been followed by an instrument of sasine, or of resignation and sasine, duly expedite and recorded, at the date of recording the conveyance in favour of the person on whose behalf the conveyance is presented for registration.

Provision is made by sect. 4 for the case of a conveyance of lands, held burgage, being contained in a deed granted for further purposes and objects; and for the case of a deed containing separate lands, or separate interests in the same lands, exactly similar to that made by the Act of
NOTARIAL
INSTRUMENTS.
 1858, sect. 2, in reference to similar deeds applicable to lands held by feudal tenure. The form of notarial instrument applicable to burgage lands is given in schedule (B) of the Act of 1860; and it may here be observed, that the proper notarial instruments of burgage lands authorized by this Act, like those of such lands authorized by the Infeftments Act of 1845, can competently be expedite by any notary-public. It is not necessary that the town-clerk of the burgh should officiate as notary in reference to notarial instruments (not being proper instruments of sasine),—whatever be the date of such clerk's appointment. Nor is the concurrence or assistance of the town-clerk required in the preparation of any conveyance, warrant of registration, or instrument (not being a

¹ 1681, c. 11.

² 23 & 24 Vict. c. 143.

proper instrument of sasine), except in the case of lands within a burgh which has no record of sasines.

By sect. 5 of the Act of 1860, the use of a clause of direction is authorized, as in the Act of 1858, sect. 3; it being declared necessary (in like manner as in the case of feudal subjects by the Act of 1860, sect. 25) that the warrant of registration in such cases shall refer to the clause of direction, otherwise the whole deed is to be registered just as if there were no such clause.

Enactments exactly corresponding with each other are thus contained in these two Acts, in reference to the completion of real rights to feudal and burgage lands respectively, by registration of conveyances, with warrants of registration thereon, or by notarial instruments as in place of instruments of sasine.

ASSIGNATIONS.

By sect. 9 of the Act of 1860, power is granted to any person in right of an unrecorded conveyance of burgage lands, to assign the conveyance by an assignation either upon or apart from the unrecorded conveyance; and to the assignee or disponee to make his right real, by registration of the conveyance and assignation or assignations, with warrant of registration, in the appropriate form as in the Act, schedule (F), No. 1 and No. 2.

By sect. 13, it is declared that all conveyances, with warrants of registration written thereon, and all notarial instruments authorized by the Act to be recorded in the Register of Sasines, may be recorded at any time in the life of the person on whose behalf the same shall be presented for registration. The date of entry in the minute-book is declared to be the date of registration; and the date of registration is declared equivalent to the date of registration of instruments of sasine, of resignation and sasine, and of cognition and sasine, according to the then existing law and practice.

The use of the new forms, however, is optional and permissive only (sect. 14), as in the case of feudal subjects.

In case of error or defect in any notarial instrument, expedite under the Act of 1860, or under the Infestments Act of 1845, or in the recording thereof, it is, by sect. 18 of the Act of 1860, declared to be competent, of new, to make and record a notarial instrument, or of new to record the conveyance with the original, or a new warrant of registration. This is a provision corresponding with that which is made in the Act of 1858, in reference to deeds and instruments of feudal subjects. And by sect. 19 of the Act of 1860, the Act of Will. IV., as to erasures in instruments of sasine, is extended to instruments of cognition and notarial instruments, authorized by the Act of 1860; and also to notarial instruments expedite and to be expedite under the Heritable Securities Act of 1845.

TOWN-CLERKS.

There is a general provision in the Act of 1860 (sect. 21), for the protection of town-clerks 'under any legal appointment or agreement existing at the foresaid date' (8th March 1860), 'but no longer,' as regards

their fees. This provision applies to the case of their recording conveyances which, by the former practice, would have been followed by instruments of sasine, or of resignation and sasine. But it would appear that in one or more royal burghs no register of sasines is kept. Such cases, to which the provision here referred to would not apply, are regulated by sect. 22 of the Act of 1860, which is to be in force during the subsistence of the rights of the then existing town-clerks. It declares that no conveyance, writ, or instrument, applicable to lands in such burgh, held burgage, and which, under the provisions of the Act of 1860, shall come in place of any writ or instrument which such town-clerk would, by law, have been exclusively entitled to prepare but for the provisions of the said Act,—shall, as regards such lands, be validly recorded in any register of sasines, unless the warrant of registration shall be subscribed by such town-clerk; or, where no warrant is required, the conveyance, writ, or instrument itself, shall be subscribed or indorsed with the signature of such town-clerk.

I have only further to notice here, that the 23d sect. of the Act of 1860 communicates the benefit of the Act to the case of lands in the burgh of Paisley, held by the peculiar tenure of booking; that is, entering the proprietor's titles in a book, or register, somewhat similar, I apprehend, to the English entry in the Rolls of the Court of the Lord of the Manor.

Conveyances of such lands are similar to those of proper feudal or burgage subjects, except that, in place of the obligation to infest, they contain an obligation 'to book and secure.' They have been in use to be followed by minutes of booking, of which extracts were given out by the town-clerk; but such minutes can now be dispensed with; the registration or booking of the conveyance, with warrant of registration thereon in the register of bookings, operating the effect of the booking and minute thereof. The Register of Bookings is kept in the burgh by the town-clerk, and the register books remain permanently under his custody.

Searches for incumbrances created by booking, or equivalent registration, on lands held by the tenure of booking, require to be made in the Register of Bookings, as in place of the registers of sasines. Such searches ought to be made by the town-clerk. Incumbrances on such lands by inhibition or adjudication are created, and the relative searches will be conducted, in the same way as in the case of feudal or burgage subjects.

TENURE OF
'BOOKING' IN
PAISLEY.

TITLE III.

JUDICIAL TRANSMISSION OF LAND.

CHAPTER I.

TRUSTS FOR CREDITORS.

WE have now examined the deeds and instruments by which the voluntary transfer of land to a stranger, or singular successor, is accomplished, and the new proprietor is substituted in the place of the old. And we are about to examine the forms of procedure by which land is judicially transferred, and parties whose title consists of a decree of Court are placed in the room of the former proprietors. And it appears to be suitable, in the first place, to examine, to a certain extent, the deeds usually executed on the voluntary conveyance of lands to trustees for behoof of creditors, which, though voluntary in point of form, generally involve in them a good deal of the compulsory character, and are in fact resorted to in order to prevent the necessity of judicial proceedings, and substantially to supply the place of such proceedings.

The deeds in question are—the Trust-Disposition by the proprietor of lands, in favour of a trustee or trustees, for behoof of his creditors ; and (instrument of sasine thereon being now unnecessary) relative Deed of Accession by the creditors.

TRUST-DISPO- SITION.

Arrangements by means of voluntary trust-deeds for behoof of creditors are resorted to in circumstances of considerable variety, and it is clearly unnecessary to enter here into all of these. I propose to give merely a general view of the cases to which such arrangements are suitable ; and in examining the trust-deed I will notice either very slightly or not at all those clauses which are common to trust-deeds for creditors, and testamentary trust-deeds ; reserving the full consideration of such clauses until we are examining testamentary trust-deeds.

The object of the voluntary trust-deed, now under consideration, is to give the unsecured creditors of the truster or debtor a guarantee that the estate conveyed to the trustees shall not be dilapidated or put away, or made the subject of unfair preferences, to their prejudice ; and, if neces-

sary, that such estate shall be realized, and the free proceeds distributed amongst them according to their rights and preferences. When, therefore, a debtor's estate is of sufficient value to enable him to raise money on bond and disposition in security, and thereby to pay his unsecured creditors, he will not place himself in the hands of any trustee. He will borrow on bond, pay off the unsecured creditors, and retain the management and control of his estate and affairs in his own hands. On the other hand, when the proprietor is hopelessly insolvent, or bankrupt, there is always great risk of a scramble for preferences over his estate, which a private trust-deed will not, in such circumstances, prevent, because all the creditors cannot be expected to accede or consent to it. A sequestration, which at once prevents all risk of preferences, will generally be found advisable in such cases. But there are cases of insolvency, where, to save expense of management, if the estate be small, or to gain time to develop mineral or other resources (which the trustee in a sequestration would not readily agree to do), a private trust may be desirable, and for the best interests of the creditors, as well as of the debtor. A private trust is likewise necessary when the debtor is extravagant in his habits, or irregular in his business-transactions; and when his means, though fully adequate to discharge all his debts, are limited. Parties will not lend money to such debtor, even on heritable security, unless a trustee be interposed on whom they can rely for regularity in payment of interest on debts, etc. This is probably the most frequent occasion now of private trusts for behoof of creditors. When, on the one hand, the trust is granted mainly to protect the estate for the unsecured creditors, that is, to prevent dilapidation by sale, or the contraction of future debt, or as a check upon irregularity; and when, on the other hand, the estate is insolvent or bankrupt;—the powers conferred on the trustees, and the general provisions of the trust-deed, are of course considerably different; and these variations will be noticed as we go along.

The narrative, or inductive clause, usually bears that the truster has contracted sundry debts, the particulars of which, with the names of the creditors, are specified, in cases where the estate is insolvent. It then bears that the trust-deed is granted for the security of the creditors in the debts specified, and of any others to whom debts are truly due at the date of the trust-deed, and whom the trustees may assume into the benefit of the trust, which they are thereby required to do.

We have then the dispositive clause. There is nothing distinctive in it, as compared with the corresponding clause in testamentary trust-deeds; except that, in case of failure of the original trustees, the mode of naming their successors will be different in the one case and the other. In the trust for creditors, if the estate is insolvent, the power of nomination will be given wholly to the creditors. In that case, they only are the beneficiaries, and the estate is, in fact, theirs. If the estate is not insolvent, the nomination will lie with the truster; or he will have

a control or *veto* upon the creditors' choice. In testamentary trusts, after they have come into operation by the maker's death, and where the trustees are not receiving remuneration for their trouble, the power of nominating successors to the trustees is now given by Statute, as was usually done formerly by the deed of trust, to the trustees acting for the time.

It is usual to make the conveyance (in the trust for creditors) comprehend not only the lands belonging to the truster at the date of the trust-deed, but all others which shall fall to him during the subsistence of the trust. But if the case is not one of insolvency, or approaching to that character, the conveyance can, with propriety, be confined to the estate belonging to the truster at the time it is granted.

We then have a declaration that the trust-deed is granted for behoof of the creditors of the granter, in debts due at its date, according to their legal rights and preferences; and the trustees are appointed to hold the estate, and to sell and dispose of the same, as far as necessary, for payment of these debts, and for fulfilment of the other purposes of the trust.

PURPOSES OF
THE TRUST.

It is then declared that the funds realized shall be applied by the trustees—1. In payment of the expenses of management, and public and parish burdens. In ordinary course, all these are preferable to the debts due by the truster to the creditors. But creditors can stipulate that their debts shall be preferable to the expenses of the management of the trust-estate.¹

2. It is usual, in the next place, to provide for repayment to the trustees of advances made by them for the general purposes of the trust. These are advances for the creditors, if they are the beneficiaries; and for the truster, if there is any reversion of his estate, after payment of his debts. But such advances should not be to any extent on account of debts due by the truster; otherwise, under this clause, the trustees might indirectly create preferences in favour of one creditor over another.

3. There will be an order to keep houses and buildings in repair, and insured against fire.

4. We then have the order to pay the creditors their debts, as far as the trust-funds will allow,—according to their legal rights and preferences; the creditors being bound, if required, to assign their debts, so far as paid, to the trustee, or some one named by him; and, if the trust-deed comes in place of a sequestration, and a dividend only is to be paid, the creditors will be required to value and deduct any special securities over the truster's estate before drawing their dividend. If, on the other hand, the trust-estate is solvent, it is very common to give the trustees power to apply a moderate specified sum in paying in full all creditors, in debts not exceeding a small limited amount. Such a power may

¹ An arrangement of this nature is noticed in the case of Wood, 20th December 1848, 11 D. 254.

greatly lessen the trouble and expense of the management, besides obviating the risk of diligence or other measures at the instance of such creditors, which would embarrass the management, or possibly upset the trust altogether.

We have, *lastly*, an order to pay over to the truster the balance of the trustees' intromissions; and to make over to him such parts of the estate as shall remain unsold, after paying all the debts specified in the trust-deed, or assumed into the benefit of the trust, and after otherwise fulfilling all the purposes of the trust.

In connexion with these appointments, we have, in the next place, several provisions intended to make the trust available to all the creditors in debts due at its date; and, at the same time, to require the creditors to bring forward their claims in due time, and to exclude any who shall fail to make the existence of their claims known to the trustees before the trust is wound up. For these purposes, the trustees are taken bound to assume into the benefit of the trust all creditors of the truster in debts due at its date, provided they shall produce their grounds of debt during the subsistence of the trust. The creditors, as we shall see, are not bound to acquiesce in the trust, unless they think fit. On the other hand, the trustees are not bound to keep up the trust, or to hold the estate for creditors who neither claim nor produce their grounds of debt whilst the trust subsists. Where, however, a claim is known, or even supposed to exist, the trustee should use his utmost endeavours to get the claim and grounds of debt produced, and should make provision for meeting the claim, until he can foreclose the party neglecting to come forward by some judicial or other proceedings.

The trust-deed further provides, that, on the one hand, enumeration of the debts contained in it shall not import that the debts are due, if they are not otherwise instructed; and, on the other hand, that the creditors' acquiescence in the trust shall not import that no more is due to them than is specified. The trust is for the benefit of the creditors, according to their just and true rights; but the trust-deed is not intended to operate as a voucher or instruction of such debts independently of the ordinary and proper vouchers, which the trust-deed nowise supersedes.

The truster after having thus conveyed the estate, and declared the purposes of the conveyance, proceeds to specify the powers conferred on the trustees, and which will be exercised by them with or without his concurrence, according as the estate is solvent or insolvent. These powers will vary according to the nature of the estate conveyed.

The objects of the powers generally may be classified as embracing—

1. The management and preservation of the estate,—in connexion with which there will generally be power to name factors and agents; to raise and defend actions in Courts of Law; and to settle claims and questions with third parties by compromise or submission.

2. The recovery of the yearly fruits and profits,—in which depart-

POWERS OF
TRUSTEES.

ment will be introduced power to grant leases and enter vassals; in some cases to work minerals and to cut woods. But the working of minerals is so much of a speculation as seldom to be allowed to trustees for creditors. If the lands are to be sold, the woods will generally be sold with the lands, leaving the purchaser to cut them or not as he thinks fit. If the lands do not require to be sold, the truster will, in most cases, stipulate for his consent as requisite before any wood is cut.

3. The realizing of capital by sales is the last general object to which the powers are directed; and the powers should be such as to enable the trustees, with or without the consent of the truster, according as the nature of the trust requires, to give purchasers a clear and undoubted title. For this purpose, the exercise of the power should be in the absolute discretion of the trustees, with or without consent of the truster. The grant of the powers should not be qualified with any words implying that the powers shall be exercised only if necessary; and it is usual and right to declare not only that the purchaser shall have no concern with the application of the price of the lands or other subjects which he purchases, but that, upon payment of such price, any security created by the trust-deed in favour of the creditors shall be evacuated, so far as it affects such lands or other subjects.

**POWER TO
BORROW.**

Trust-deeds sometimes contain power to the trustees to borrow a sum of money, of limited or specified amount, for trust-purposes. But, as a general rule, no such power ought to be given in the case of an insolvent estate, lest it be employed so as to operate a preference of one creditor over another. The creditor lending money to the trustee for trust-purposes would, of course, be preferable to those for whom the trustee acts; and, unless the money borrowed were employed in paying a dividend to all the unsecured creditors, those who received no part of it would be prejudiced. The power, therefore, if given in connexion with an insolvent estate, should be carefully qualified as to the purposes to which the money may be applied; the lender, of course, having no concern with these purposes, but being fully secured by the bond or other security granted by the trustees.

Some trust-deeds will appoint a committee of advice, or give authority to the creditors to name such committee,—the members of the committee having power to control the trustee's administration, audit his accounts, settle the amount of his remuneration, and discharge him. And in insolvent trusts there will be a power to the majority of the creditors in number and value to remove the trustee—(in such cases one trustee only being usually named); power to the trustee to resign, upon due notice to the parties who have to name his successor, so that the trust-management may not be in abeyance; and a declaration that, although all the trustees shall successively fail to accept, or shall resign and denude, or shall die or be removed, the trust shall notwithstanding subsist as a security to the creditors over the trust-estate.

We have, *lastly*, clauses providing that the trustees shall not be

liable for omissions, nor for factors, etc.,—which are similar in their structure to clauses of the same nature usually expressed in testamentary trust-deeds; and I need only say here, that whilst such clauses will not, in any case, absolutely protect trustees against all omissions and irregularities, they will afford much less protection in the case of trustees for creditors, especially if receiving remuneration for their services, than in the case of testamentary trustees acting gratuitously.

The trust-deed will contain the clauses appropriate to it as a conveyance of lands; no obligation to infeft, or precept of sasine, being now required as to feudal subjects; and no obligation to infeft, or procuratory of resignation as to burgage. The right of the trustee will be made real, and, if necessary, completed by entry with the superior in feudal subjects, exactly as in the ordinary case of the conveyance of lands to a new proprietor absolutely. In like manner, the right to debts conveyed will be completed by intimation to the debtor; and so with other subjects. In each case the right of the trustee will be completed according to the nature of the subject conveyed, just as if he had been absolute proprietor.

The trust-deed, being granted by the truster alone, imposes no obligation on the creditors for whose behoof it is granted, unless they accede to, or acquiesce in, the arrangements which it proposes. It is a species of offer to them, which they may accept or not as they please. There ought, accordingly, to be framed, in connexion with such deeds, a DEED OF ACCESSION BY CREDITORS. relative deed of accession and submission, to be executed by the creditors if they acquiesce. By this deed, the creditors, on the recital of the trust-deed, accede to and ratify it; and they usually submit to the trustees, if professional men, or to some other persons named as referees, all claims they have on the truster, giving such referees power to settle the order of their ranking and preference as claimants on the estate.

The acceding creditors then engage to supersede diligence against the truster and his estate, unless non-acceding creditors shall do diligence; in which case the acceding creditors reserve power to do likewise for their own protection; at the same time, they give the trustees power to discuss and settle questions with non-acceding creditors, and to contest alleged preferences, if any, and to sue and defend in actions with them.

The deed of accession may further settle the yearly allowance, if any, to be made to the truster during the subsistence of the trust, and generally may be employed to supply omissions, if any, in the provisions of the trust-deed; or to alter its purposes or provisions, where supplement or alteration is necessary; the truster being, of course, a party to the deed of accession, in cases where it alters the arrangements proposed by him in the trust-deed.

The trustees, when fully vested in the estate, become accountable for their intromissions to the creditors claiming under the trust.¹ And, if

¹ Duke of Hamilton's Creditors, 24th November 1747, M. 16,201; affirmed 16th Jan. 1750, 1 Craigie & Stewart's App. 447.

the trust includes lands held in feu-farm, the trustees, by making up their titles to such lands, and drawing the rents, adopt the feu, and become personally liable for the feu-duty,—with relief, of course, against the trust-estate, which is the proper debtor.¹ They are, however, proprietors, though only in trust, and can exercise such rights of ownership as are not inconsistent with the qualified nature of their right. For example, they can sue actions of declarator of non-entry against the heirs or others in right of deceased vassals in lands held of them as superiors, though their right of superiority arises only under the trust-deed.² And when the trust-deed contained power of sale for payment of the truster's debts, for great part of which the trustee was personally liable, the trustee was held not bound to postpone a sale, on a mere intimation that the truster was to put an end to the trust by relieving him of his obligations; the truster showing no means whereby he could accomplish this.³

EFFECT ON
CREDITORS'
SUCCESSION.

It is stated by Erskine,⁴ that the conveyance of land to trustees for behoof of creditors makes the debts due to them heritable, though, previously to the trust, such debts were moveable. This doctrine has been corrected by Lord Ivory, in a note; and it has now been decided that debts due on personal bonds remained moveable, though they had been secured by a conveyance of lands to trustees for more than forty years.⁵ This is a matter which will be regulated by the intention of the parties as shown in the deed or deeds. At least, if the deeds show clearly the intention to make the creditors' claims real burdens, effect will be given to such intention. But, in the general case, the right of the creditor is not of the nature of a special security over the lands, for payment of his debt, but simply a right to call the trustees to account; and such right is attachable by the creditors of the creditors, by the diligence of arrestment,—a diligence competent only with reference to personal estate.⁶ But, though the general rule is that the debts remain moveable, notwithstanding the conveyance of land to trustees for their security, the debts may be made heritable, if the conveyance is to the creditor or creditors by name, and expressly for security of their debts, with specification of the amount; or if the conveyance is so conceived as to give to the creditors, with their own concurrence, real rights in the estate, not merely personal claims on the trustees. In certain cases, where a trust-deed thus comes in the place of a bond and disposition in security in favour of the creditors, the trust-deed is liable in mortgage stamp-duty.⁷

The acceding creditors are barred from taking separate measures, except so far as power to do so is reserved to them in the deed of trust or accession. They have become parties to an arrangement with which

¹ Marquis of Abercorn, 16th Dec. 1835, 14 Sh. 188.

² Ker, 7th Dec. 1838, 1 D. 179.

³ Innes, 18th Dec. 1828, 7 Sh. 206.

⁴ Erskine, ii. 2. 15.

⁵ Hawkins, 23d May 1843, 5 D. 1035.

⁶ Grierson, 15th February 1780, M. 759.

⁷ 13 & 14 Vict. c. 97; Schedule, voce Mortgage.

such measures are inconsistent; and a creditor is not allowed to take separate measures although the trustee shall have died; at least, if there be a power to the creditors to elect a new trustee in room of the one who has died.¹

When the purposes of the trust are fulfilled, the trustees are bound WINDING UP. to account to the truster, or his representatives, for their intromissions and management; and, on obtaining a valid discharge and exoneration, to denude of the estate, so far as still in their hands, in favour of the truster, or of such representatives. And if such estate consists of lands which belonged to the truster, and were conveyed to the trustee for his creditors, the truster's original right remains in him. The trust merely created a burden on his right; and, on fulfilment of the purposes, the burden is extinguished, and the lands are at his free disposal, just as if he had granted a bond and disposition in security to a creditor, and had paid and obtained a discharge of the debt.²

CHAPTER II.

I NOW take the case of the judicial transfer of lands arising by SEQUESTRA-
Sequestration of the debtor under the Bankrupt Act of 1856,³ which TION.
repeals former Bankrupt Acts, except as regards acts and deeds prior to the operation of the new Act, and re-enacts many of their provisions. By the Act of 1856, sequestration may be awarded of the estate of any living debtor, subject to the jurisdiction of the Supreme Courts of Scotland. An insolvent Englishman, without any home in England, came to Scotland for the purpose of obtaining sequestration, and resided there in a country town for forty days. He had no estate, and only one creditor, whose debt was secured; but he was found to be subject to the jurisdiction of the Supreme Court of Scotland, in the sense of the Act, *ratione domicilii*.⁴ In order to prevent the abuse of the Act of 1856, in cases to which it really was never intended to apply, the Bankruptcy Amendment (Scotland) Act 1860⁵ was passed. This Act, by sect. 2, gives the Court of Session, or Lord Ordinary, power to recal the sequestration, if,—upon a summary petition by the Accountant in Bankruptcy, or by any creditor, or person interested, at any time within three months after the date of the sequestration, and after such inquiry as the Court or Lord Ordinary shall think fit,—it shall appear that a majority of the creditors in number and

¹ Hamilton, 11th Jan. 1833, 11 Sh. 701; reversed 18th March 1836, 2 Sh. & M'L. App. 355.

² Campbell, 14th Jan. 1801, M. App. Adjudication, 11; M'Millan, 4th March 1831,

9 Sh. 551; affirmed 14th Aug. 1834, 7 Wil. & Sh. App. 441.

³ 19 & 20 Vict. c. 79.

⁴ Joel, 10th June 1859, 21 D. 929.

⁵ 23 & 24 Vict. c. 33, s. 2.

value reside in England or Ireland, and that, from the situation of the property of the bankrupt, or other causes, his estate ought to be distributed among the creditors under the bankrupt or insolvent laws of England or Ireland.¹

Sequestration may be awarded also in the case of a deceased debtor, who, at the date of his death, was subject to the jurisdiction of the Supreme Courts of Scotland.

The award proceeds on petition to the Court of Session, or to the Sheriff of any county in which the debtor, for the year preceding the date of the petition, resided or carried on business. The petition, in the case of a living debtor, may be at his own instance, with concurrence of a creditor, or creditors, in debts of a specified amount; or at the instance of creditors alone, where the debtor is notour bankrupt; and in certain other cases. When the debtor is deceased, the petition may be at the instance of a person to whom he had granted a mandate to apply for sequestration, or of a creditor, or creditors, qualified as expressed in the Act.

The sequestration is declared (sects. 107 & 108) to be, as of its date, equivalent to a decree of adjudication, that is, a conveyance by the Court of the heritable estate of the bankrupt for payment of all his debts, principal and interest, accumulated as at said date; and to an arrestment in execution (that is, on a liquid ground of debt, and with a view to immediate payment or transfer of the arrested funds), and decree of furthcoming, and an executed or completed poinding; in other words, to completed diligence against the debtor's whole estate, real and personal, operating the immediate transfer of such whole estate to the trustee for the creditors.

An abbreviate of the petition is appointed to be recorded in the Register of Inhibitions before expiry of the second lawful day after the date of the first interlocutor or deliverance. In the case of a deceased debtor, this provision is sometimes overlooked; because, generally, there can be no sequestration in such case for some time after the petition is presented, and the first deliverance obtained. But the necessity to record within the two days is the same in all cases.

TRUSTEE AND COMMISSIONERS.

After sequestration is awarded, the creditors meet to elect a trustee, or trustees in succession (sect. 68), and three commissioners, who must be creditors, or their mandatories, if so many have claimed (sects. 75 & 76). As regards the parties who can be elected to the office of trustee, or commissioner, the Act declares the bankrupt himself disqualified; likewise any person conjunct or confident with him, or who holds an interest opposed to that of the general body of the creditors, or who is not resident within the jurisdiction of the Court of Session.

After the election of trustee takes place, the Sheriff, whose judgment on this point is final, declares the party, or parties, chosen by the creditors

¹ This power was exercised by the Court in the case of Brandon, 9th Jan. 1861, 24 D. 263.

to be trustee, or trustees in succession (sects. 69-71); and, on caution being found (sect. 73), which may be by the bond of a guarantee company, as well as of a private cautioner, the Sheriff confirms the election, and the Sheriff-Clerk issues an act and warrant (schedule D) in favour of the trustee, expressing that the confirmation has taken place, and that the whole of the estates and effects, heritable and moveable, real and personal, wherever situated, of the bankrupt, are transferred and belong to the trustee for the creditors, in terms of the Statute; and that the trustee has full right and power to sue for and recover all estates, effects, debts, and sums of money belonging to the bankrupt.

ACT AND
WARRANT.

The act and warrant of the Sheriff, when he confirms the trustee's election, is the deed of conveyance, so to speak, in favour of the trustee, and is, by sect. 73, declared to be an effectual title to the trustee to perform the duties imposed on him, and to be the evidence of his right to the sequestrated estate for the purposes of the Statute, which, in the same section, contains the following very important enactment as to the mode of authenticating the act and warrant for use out of Scotland: 'A copy of such act and warrant in favour of the trustee, purporting to be certified by the Sheriff Clerk, and to be authenticated by one of the Judges of the Court of Session, shall be received in all Courts and places within England, Ireland, and her Majesty's other dominions, as *prima facie* evidence of the title of the trustee, without proof of the authenticity of the signatures, or of the official character of the persons signing; and shall entitle the trustee to recover any property belonging, or debt due, to the bankrupt, and to maintain actions in the same way as the bankrupt might have done if his estate had not been sequestrated.'

The Statute, moreover, is very specific as to the effect of the act and warrant as operating the transfer of the bankrupt's estate to the trustee. The act and warrant is declared (sect. 102) '*ipso jure* to transfer to and vest in the trustee, or any succeeding trustee, for behoof of the creditors, absolutely and irredeemably, as at the date of the sequestration, with all right, title, and interest, the whole property of the debtor,' to the effect therein set forth; and particularly, 'The moveable estate and effects of the bankrupt, wherever situated, so far as attachable for debt, to the same effect as if actual delivery and possession had been obtained, or intimation made, at that date, subject always to such preferable securities as existed at the date of the sequestration, and are not null or reducible.'

As regards the heritable estate, the effect of the act and warrant is declared, by the same section, to be the same 'as if a decree of adjudication in implement of sale, as well as a decree of adjudication for payment and in security of debt, subject to no legal reversion, had been pronounced in favour of the trustee, and recorded at the date of the sequestration, and as if a poiding of the ground had then been executed, subject always to such preferable securities as existed at the

'date of the sequestration, and are not null and reducible, and the creditors' right to poind the ground,' as afterwards provided in the Act; and the right of the trustee is not to be challengeable on the ground of any prior inhibition,—saving the effect of the inhibition in the ranking of the creditors on the estate. The act and warrant also vests in the trustee all real estate of the bankrupt, situated in England, Ireland, or in any of Her Majesty's dominions, and all interest of the bankrupt therein.

As regards the decrees and other procedure to which the sequestration and act and warrant of confirmation are thus declared equivalent, the following summary explanations may be given :—

1. The decree of adjudication in implement of sale is an absolute judicial disposition, equivalent to the conveyance of lands by the proprietor to a purchaser.

2. The ordinary decree of adjudication for debt is a similar disposition, in payment and security of debt, subject to the debtor's right of reversion or redemption on payment of the debt within ten years; but, by the Act, the bankrupt's right of reversion is expressly excluded. This, therefore, is an absolute judicial disposition in another form.

3. The poinding of the ground is a diligence by which a heritable creditor can attach and realize, towards payment of his debt, his debtor's moveables, situated on the ground of the lands held in security.

And the arrestment in execution, followed by decree of furthcoming, operates the complete legal transfer to the arrester of the personal estate, liable to and comprehended in such diligence, in the same way as delivery of corporeal moveables, or an assignation of debt followed by intimation.

SUPERIOR'S
RIGHTS.

All these rights are united in the title of the trustee under the sequestration. But the transfer to the trustee is to have no effect upon the rights of the superior of feudal subjects, nor upon any question of succession between the heir and executor of any creditor claiming in the sequestration, nor upon the rights of the creditors of the (debtor's) ancestor, except that it operates in their favour as complete diligence,—and, if any part of the bankrupt's estate is held under an entail, or by a title otherwise limited, the trustee's right is effectual only to the extent of the bankrupt's interest. The rights of the superior which the above clause protects are his feu-duties and casualties, and, generally, his interest in the sequestrated property feudally held of him. The trustee, if he takes such property, adopts it subject to all these rights.

ANCESTORS
CREDITORS.

In reference to the rights of succession of the heirs and executors of the creditors, we have seen that the creation of a private trust, for behoof of creditors, does not, in the general case, make heritable the debts which were previously personal; and, on the same principle, sequestration, which is a judicial trust-conveyance of the estate of the debtor, is to have no effect on the rights of the heirs and executors of the creditors. Neither are the rights of ancestors' creditors (that is, of the creditors of the bankrupt's ancestors) to be prejudiced. This provision has reference to the preferable claim which such creditors have, over the creditors of their

debtor's heir, upon the ancestor's estate, for year and day after the ancestor's death. Such preferable claim is to subsist, as affecting estate to which the bankrupt has succeeded as heir of any of his ancestors within year and day prior to the sequestration. The ancestor's estate, however, is not excluded from the sequestration. The trustee takes it for behoof of the bankrupt's or heir's creditors, subject to the preferable claims of the ancestor's creditors; and the sequestration operates as completed diligence over such estate in favour of the ancestor's creditors; thus securing to them their preference.

The Act (sect. 103) declares that estate coming to the bankrupt after the sequestration, and before he is discharged, shall *ipso jure* fall under the sequestration. The full right and interest of the bankrupt therein shall be held as transferred to and vested in the trustee, as at the date of the acquisition or succession, for the purposes of the Act. And, on application to the Lord Ordinary, such estate will be declared to be vested in the trustee accordingly. And if, in the case of a deceased debtor, titles have been made up by the heir prior to the sequestration, the trustee has power (sect. 106) to obtain a title by petition to the Lord Ordinary, and act and warrant thereon, which, when obtained, is equivalent (as to such estate) to the act and warrant in favour of the trustee in the ordinary case. An abbreviate of the petition, and deliverance thereon, has to be registered in the Register of Inhibitions; and the act and warrant has to be registered in the Register of Adjudications.

The act and warrant in favour of the trustee, however, is equivalent, in the case of heritable estate, only to a conveyance. It does not, of itself, confer on the trustee a real title to the heritable estate,—only a personal right. But the trustee can make up a feudal title if he thinks proper. For that purpose the bankrupt is appointed by sect. 105, if required, to grant all deeds necessary for recovering his property, and feudally vesting his heritable estate in the trustee for the purposes of the Act. And, if the bankrupt's title has not been completed, the trustee may complete titles in his own person, or in the person of the bankrupt; superiors being bound, if required, to enter the trustee, or the purchaser from him, in terms of law. The trustee, moreover, may, without making up a feudal title, and without concurrence of the bankrupt, grant conveyances of the heritable estate with such procuratories, precepts, or other warrants, as the bankrupt might competently have granted; which conveyances are as effectual to the purchaser as if they had been granted by the bankrupt, with concurrence of the trustee, and shall not be affected by any inhibition against the bankrupt; reserving the effect of such inhibition in the ranking of the creditors.

The principle on which the trustee is thus entitled to grant conveyances, which transfer not merely his own personal right, but the real right as standing in the person of the bankrupt, without such trustee having first established a title in his own person, is very similar to that applicable in the case of a commissioner. The Act of Parliament gives

COMPLETION OF
TRUSTEE'S
TITLE TO
HERITAGE.

the trustee an irrevocable commission; and all deeds by the bankrupt, after the sequestration, being declared null (sect. 111), it often happens that the trustee does not require to make up any feudal title. But the Act does not prevent parties, who prior to the sequestration have obtained a conveyance or security from the bankrupt, which has not been made real, from rendering their rights real after the sequestration, in due form of law. For example, a heritable creditor may not have recorded his bond, or he may have recorded it imperfectly. In such cases the trustee, if he shall first make his right real, will exclude the creditor from his preference; and, wherever the completion of an imperfect right is apprehended, the trustee should make his own right real without delay. When he has to do so, and assuming that the bankrupt's own title was completed, the trustee can, as we have already observed, obtain a conveyance from the bankrupt, which, when registered with warrant of registration thereon in the appropriate Register of Sasines, will give him a complete real right, unless in the case of feudal subjects held with an *a me* holding only, as to which confirmation from the superior will be required. He can also make use of his act and warrant of confirmation as a decree of adjudication in implement, that is, an absolute judicial disposition; and thereupon, if the lands are held by burgage tenure, he can expedite and record an instrument of sasine in his favour, *more burgi*, following on the act and warrant. If the lands are held by feudal tenure, he can, in virtue of the act and warrant, obtain from the superior a charter of adjudication, which, when registered or followed by sasine, will give as complete a title as was held by the bankrupt; or, under the Titles Acts,¹ he can expedite a notarial instrument, setting forth his act and warrant of confirmation, and specifying the lands belonging to the bankrupt to which a title is to be completed, and the title by which such lands were held by the bankrupt; and, on recording such instrument in the appropriate Register of Sasines, he will be in the same position as if the bankrupt had granted in his favour a conveyance of the lands contained in the instrument, and he had expedite instrument of sasine thereon. In the case of lands held by feudal tenure, and where an *a me* holding only is authorized, the superior's confirmation will be required, in order to make the title complete.

STATE OF
BANKRUPT'S
TITLE.

And it will be kept in view, that the title in favour of the trustee,—whether by disposition from the bankrupt, or act and warrant of confirmation, and notarial instrument,—and whether as regards feudal or burgage subjects,—is effectual only as far as the bankrupt himself has a title. Thus, it does not supersede the necessity of titles being made up to lands to which the bankrupt had succeeded as heir, and had not made up a title, before the sequestration. The trustee must make up titles to such lands, deduced from the person in whom they were last vested, and

¹ 21 & 22 Vict. c. 76, s. 22, schedule (M) as to feudal subjects; and 23 & 24 Vict. c. 143, s. 15, schedule (I) as to burgage subjects.

to whom the bankrupt has succeeded. Such titles can be either in the trustee's own person, or in the person of the bankrupt; in which last case the disposition from the bankrupt, or the act and warrant of confirmation, transfers them from the bankrupt to the trustee.

If there are no securities depending on the state of the bankrupt's title, it is of no consequence to the general body of creditors whether the trustee shall complete titles in the one way or the other. But, if there are securities granted by the bankrupt over the estate to which he has not made up titles, then it is the duty of the trustee to make up titles in his own person, and not in the bankrupt's person; because, if he makes up the bankrupt's titles, he will validate such securities; whereas, if the title is in his own person, the securities will remain imperfect. They will be null and reducible; and the fund for division among the general body of the creditors, for whom especially the trustee is appointed to act, will be increased to the extent of the sums contained in such null securities, or at least to the extent of the value of the subjects contained in such securities.

In realizing the estate, the trustee is empowered to sell by public roup, or judicially. In the former case, the proceedings will be conducted under direction of the trustee and commissioners; and the articles of roup will form a proper part of the title, as being the best mode of instructing that the sale was by roup; in the latter case, the proceedings will be carried on in the Court of Session, and under direction of the Lords of Session, as in other cases of judicial sale. The trustee can also sell by private bargain (sect. 115), but, in that way, only 'with concurrence of a majority of the creditors in number and value, and of the heritable creditors, if any, and of the Accountant in Bankruptcy.'

Creditors holding securities over the estate preferable to the right of the trustee, with power of sale, can sell in terms of their securities, notwithstanding the sequestration; and such creditors may concur with the trustee in selling,—or he may concur with them; and, on payment of the price as appointed by the Act, the lands sold by the trustee, with concurrence of a heritable creditor, are declared free and discharged of the security of the consenting creditor, whether satisfied or not, and of all securities postponed to the security of such creditor (sects. 112, 113).

The trustee, or commissioners, or adjudger—by which I understand heritable creditor,—selling, cannot purchase (sect. 120); and a purchase in name of a third party, when truly for behoof of the trustee himself, is void.¹ In Brown's case, the purchase was made in name of the trustee's son, a lad of sixteen years of age, residing in family with his father, and apparently possessed of no means or estate of his own. This was therefore a very clear case against allowing the purchase to stand; but it is sufficient to annul the purchase of part of a sequestrated estate, that it is truly made for the trustee. His business is to sell for the best price

¹ Brown, 23d Dec. 1848, 11 D. 338.

that can be got ; a duty which he cannot fulfil if he has the adverse interest of a purchaser, whose object is to acquire the subject at the lowest price. But when the trustee sells publicly, with concurrence of a heritable creditor, that creditor may validly purchase, in terms of the 120th section of the Statute ; which provides, generally, that when any heritable estate is sold publicly, by virtue of the Act, it shall be lawful for any creditor to purchase.¹

**DISCHARGE OF
BANKRUPT.**

The Act provides for the discharge of the bankrupt, either upon composition (sect. 137), in which case the estate, so far as unrealized, falls back to him ; or without composition (sect. 146), in which case the estate remains with the trustee, till realized and distributed among the creditors.

**EXEMPTION
FROM STAMP-
DUTY.**

The only other point connected with the Bankrupt Act, as a Conveyancing Statute, to which I think it necessary to call your attention, is, that by sect. 184 conveyances and various other writings, relating solely to the estate belonging to the bankrupt, and which, after execution of such conveyances, etc., shall be and remain the property of the bankrupt, for behoof of the creditors,—and sundry other specified documents—are exempt from all stamp-duties, or other Government duty.

¹ Cruickshank, 15th Feb. 1849, 11 D. 614.

CHAPTER III.

I NOW proceed to explain the adjudication in implement,—a form of transfer frequently met with in past practice, but which has been generally rendered unnecessary by the simple forms introduced by the Titles Acts. I take up this form of title here, because it partakes of both the voluntary and the judicial transmission in its composition, and more of the former than the latter. It may be said to consist of two parts :—(1.) The obligation to convey, voluntarily granted, but not containing in itself words of direct conveyance, and so not giving a feudal title; and (2.) The judicial conveyance, which gives a feudal title in implement of the voluntary obligation. The obligation, which is the foundation of the title, is voluntary. The completion of it is accomplished by a judicial process.

Adjudications in implement were formerly resorted to as a matter of necessity by all parties to whom obligations to dispoⁿe (whether express or constructive), or dispositions without the executive clauses of procuratory of resignation or precept of sasine, had been granted, and who could not obtain supplementary dispositions with the requisite clauses. These writings, being without precept of sasine, were not warrants for direct infeftment; and, being without procuratory, they were equally defective as warrants to resign in the hands of the superior for obtaining new infeftment from him. The process will still be resorted to, where there is in express terms a mere obligation to convey, of which voluntary implement cannot be obtained,—and, no doubt, in other cases also; and we are now to examine what is the remedy of the parties having right to such imperfect conveyances or obligations. This remedy is supplied without any Statute. The Common Law has devised the adjudication in implement to meet the case now before us. This adjudication proceeds on a summons at the instance of the holder of the obligation, or imperfect disposition, against the granter of it, reciting the same, and the refusal or failure to grant a proper title; upon which, if no cause be stated to the contrary, the Court grant decree, adjudging the lands from the recusant or defaulting party, and decerning and declaring the same to belong to his obligee or dispoⁿee, in implement and satisfaction of the obligation, or imperfect disposition. The Court thus, by their decree, *implement* or fulfil the recusant's obligation or imperfect disposition. They *adjudge in implement* thereof; and hence the technical name or character of their decree.

The subjects, if consisting of lands held on irredeemable title, are adjudged heritably and irredeemably,—if consisting of lands held under reversion, then they are adjudged under reversion in like manner. The

decree further transfers to the adjudger the titles of the lands, and ordains the granter of the obligation, or imperfect disposition, to purge the lands of all incumbrances, and free the adjudger of bygone public and parish burdens.

The decree of adjudication is equivalent merely to a disposition; it is just a disposition by the Court; and, in order to the complete transference of the lands from the former owner,—the party against whom the decree was obtained,—it is necessary that the adjudger obtain a real right.

COMPLETION
OF ADJUDGER'S
TITLE.

As regards the mode of proceeding for this purpose, the law has recently undergone successive changes. Supposing the party against whom the adjudication was obtained to be infest,—then, prior to the passing of the Lands Transference Acts of 1847, a real right could be obtained by the adjudger only by means of a charter from the superior of feudal subjects, and sasine thereon; and a sasine, *more burgi*, of burgage subjects. The decree of adjudication, as framed at the period now referred to, ordained the adjudger to be infest in the lands, to be holden of the superior in like manner and as freely in all respects as his author held or might have holden the same,—that is, simply *a me*; and it authorized letters of horning against the superiors, charging them to enter the adjudgers. In virtue of this decree, and of the letters of horning, which were seldom resorted to in cases of adjudication in implement, the superior of feudal subjects was bound to grant to the adjudger a charter of adjudication in implement, with or without confirmation, as the state of the title, in the party against whom the adjudication was led, may have required.

CHARTER OF
ADJUDICATION.

The charter was very similar to the charter of resignation, or of resignation and confirmation; the only difference requiring notice being in the *quæquidem* clause. In the charter of resignation, that clause expressed that the lands were resigned by the former owner in the hands of the superior, in order to be disposed to the new owner. In the charter of adjudication, the *quæquidem* clause expressed that the lands were adjudged by the Court from the former owner, and decerned to belong to the new owner. The object of the clause, in both cases, was merely explanatory; deducing the title from the former owner to the new owner, and showing on what authority the superior came to make the new grant; such grant being made, in the one case, in virtue of the former owner's resignation,—in the other case, in obedience to the decree of the Court.

The charter of adjudication, with or without confirmation combined, contained, at the period now referred to, precept of sasine; and the adjudger completed his title to the lands held by feudal tenure by instrument of sasine, following on that precept. As to burgage lands, the decree of adjudication was a warrant for instrument of sasine, *more burgi*, in favour of the adjudger; which, when recorded, completed his title.

The Lands Transference Act of 1847¹ made important changes in reference to lands held by feudal tenure. Under the old law, the adjudger could obtain a real right in feudal subjects only through the superior; and the decree adjudged the lands to be holden *a me* only. But, by sect. 19 of the above Act, it is declared lawful for the Court, in all cases when pronouncing decree of adjudication, to grant warrant, in terms of schedule (K), for infefting the adjudger to be holden *a me vel de me* in usual form; in other words, to grant a precept of sasine with alternative manners of holding; and, supposing the party adjudged from to have been in a situation to have required from the superior an entry by confirmation, the adjudger was entitled, in virtue of the Court's said warrant, to take infeftment, which infeftment with the decree of adjudication on which it proceeded are declared to be an effectual feudal investiture, holding of the party adjudged from, and his heirs,—that is, *de me*,—until confirmation thereof by the superior; in the same manner as if the party adjudged from had granted a disposition of the lands to the adjudger, with an obligation to infeft *a me vel de me*, and a precept of sasine, and the adjudger had been infeft on such precept. And, even if the lands should be held subject to a prohibition to dispone to be holden *a me vel de me*, the precept is to be regarded as alternative, and to operate a valid feudal investiture; without prejudice to the superior's right to demand an entry from the adjudger, and to the superior's casualties, which the Act reserves entire.

Now, by the Titles Acts,—of 1858 as to feudal, and 1860 as to burgage, subjects,—the adjudger can make his right real by registering the decree of adjudication, with warrant thereon, in the appropriate register of sasines; and, even as to feudal subjects, the decrees do not require to contain any precept or warrant of infeftment. By the Acts of 1858 and 1860, they are placed on the same footing with voluntary dispositions, as conveyances of lands, and as the *media* for obtaining real rights therein.

The Titles Act of 1858 does not affect the right of the superior,² which is, in all respects, the same as before; and the new modes of procedure, authorized by the Act of 1847, as well as by both the Titles Acts, are not imperative. They are only optional; and it is therefore open to parties to proceed according to the older methods; though it is not likely that such older methods will often be advisable.

If the granter of the obligation had only a personal right, not made real by registration or sasine, the decree of adjudication operates the transference of such right, and enables the adjudger to obtain infeftment in burgage lands, in virtue of any procuratory of resignation in favour of his author, or in feudal subjects, in virtue of a similar procuratory, or of a precept of sasine in favour of his author; the decree, in each case, being used as the connecting link; or, as to either feudal or burgage subjects, the adjudger may expedite notarial instrument, in terms of the Titles Acts of 1858, sect. 14, and 1860, sect. 10.

¹ 10 & 11 Vict. c. 48.

² 21 & 22 Vict. c. 76, s. 27.

AGAINST HEIR
UNENTERED.

The case before stated is that of an adjudication against the party who granted the obligation himself. But the process of adjudication is competent, and has been much more frequently resorted to, after the death of such party, and therefore against his heir under the investitures of the lands to be adjudged. In this last case, we do not begin with a simple summons against the heir, seeking adjudication of the lands in implement of the obligation or imperfect disposition; because it was not the heir who granted that deed. It is necessary, in the first place, to impose the ancestor's obligation upon the heir; to place the heir, in the eye of the law, in the same position as if he himself had granted the obligation. For this purpose, it was formerly necessary, in the first place, to raise and execute against the heir letters of general charge, which passed the Signet, and under which messengers-at-arms, in the Sovereign's name, charged the heir to enter himself heir to his predecessor within forty days; with certification that, if he should fail, the same recourse should be had against him as would have been competent against his predecessor, if he had been still alive. The general charge was authorized by the Act 1540, cap. 106; and, by a fiction of law, it produced the same effect as if the heir had actually incurred representation of his predecessor, as far as the party who raised the letters of general charge was concerned.

LETTERS OF
GENERAL
CHARGE.

ACTION OF CON-
STITUTION.

The next step was to raise an action for imposing upon the heir, or constituting against him, the particular obligation by his ancestor whereof implement was desired; called an action of constitution. This action founded on the ancestor's obligation or imperfect disposition, and on the general charge, as fixing upon the heir the representation of his ancestor, and liability to implement the obligation; and it concluded that the heir should be ordained to make up titles to the lands, as heir of his ancestor, and dispoise the same in implement of that obligation. Decree in that action imposed the obligation on the heir; placing him, so far, in the same position as if he had granted the obligation himself.

The procedure now detailed has fixed on the heir representation to his ancestor, and has constituted, or imposed on him, his ancestor's obligation. But the heir has made up no title; and something must be done to connect him with the lands, which still remain *in hæreditate jacente* of his ancestor. For that purpose, under the old system, it was necessary to raise against him letters of special charge where his ancestor was infeft, and of general special charge where his ancestor was not infeft, but had only a personal right. These letters likewise passed the Signet, and were directed by the Sovereign to messengers-at-arms. Under the former (the special charge), the heir was charged, on twenty days' warning, to enter himself heir in special to his ancestor in the lands which were to be adjudged; and the effect of this charge was, *fictione juris*, equivalent to service and infeftment of the party charged as heir of his ancestor in these lands. Under the latter (the general special charge), he was

LETTERS OF
SPECIAL AND
GENERAL
SPECIAL
CHARGE.

charged, on the same *inducias* of twenty days, to enter himself heir in general to his ancestor; and the effect was equivalent to a general service, whereby personal rights to lands are transmitted from a party deceased to his heir. The letters, in either form, contained a certification that, in case of failure to enter as required, the charger should have adjudication and other diligence against the heir, as lawfully charged to enter, in the same way as if he had actually entered; that is, as if he had completed titles in his person as heir of his ancestor.

By these steps, and according to a series of legal fictions, the representation has been fixed on the heir,—the obligation has been constituted or imposed on the heir,—and the title to the lands completed in the person of the heir; and, this being done, the action of adjudication then followed, which was not materially different from that against the granter of the obligation himself. The only difference consisted in the narrative of the preliminary procedure deduced against the heir, and a few verbal variations in the decree.

But, by the Lands Transference Acts of 1847,¹ the citation, in the action of constitution, was declared equivalent to the general charge, and the citation in the action of adjudication equivalent to the special charge, or general special charge; and these charges are, therefore, dispensed with, in point of form; and by the Titles Acts of 1858, sect. 27, and 1860, sect. 16, the actions of constitution and adjudication may be conjoined. It is no longer necessary to have first the one and then the other action separately.

The only variation in point of form still requiring to be noticed is that which arises when the heir makes appearance in the action of constitution, and renounces his right to be heir in the lands. There can be no decree against the person who has renounced to be heir; because such decree is warranted only on the ground of the defender being liable *quod* heir,—a character which he has renounced. Neither can a charge be given him to enter himself heir in special, or in general, after he has renounced. There must still be a decree of constitution; but it is obtained *cognitionis causâ tantum*—that is, only ascertaining the obligation of the deceased, to the effect of authorizing adjudication in implement thereof, in favour of the holder of the obligation; and this decree is followed by decree of adjudication in implement *contra hæreditatem jacentem*. In the ordinary case, the special, or general special charge, had the same effect, *fictione juris*, as if the heir's title had been completed, and the lands vested in him. There is here a renunciation to be heir. The lands are not vested in the defender,—on the contrary, they remain in the *hæreditas* of the deceased. Hence the nature or peculiarity of this adjudication.

The actions of constitution and adjudication in implement may be combined, whether the heir renounce the succession or not.² When the heir renounces, decree *cognitionis causâ* is pronounced; and there-

WHEN HEIR
RENOUNCES.

DECREE *cogni-*
tionis causâ.

¹ 10 & 11 Vict. c. 48, s. 16, as to feudal subjects; and 10 & 11 Vict. c. 49, s. 8, as to burgage subjects.

² Titles Act of 1858, s. 27.

after decree of adjudication *contra hæreditatem jacentem*; and both decrees are included in one official extract.

CITATION AND
induciae
INDISPENSABLE.

It is not uncommon, in carrying formal processes through the Court of Session, for the agents of the parties called as defenders to hold summonses as executed against the defenders, and dispense with the messenger's execution or citation, or with the *induciae*. But in the case of summonses of constitution and adjudication, directed against heirs for implement of their ancestors' obligations, this ought not to be done. As far as the mere actions of constitution and adjudication are concerned, the dispensation would not be irregular. But by the Lands Transference Acts of 1847, sects. 16 and 8 respectively, the citation on, and execution of, the summons of constitution against the heir, and the citation on, and execution of, the summons of adjudication respectively, imply, and are equivalent to, a general charge, and to a special or general special charge, the *induciae* of which expire with the *induciae* of the summonses respectively. These being statutory provisions, and there being no authority for dispensing with the general, and special, or general special charges, except what is contained in the Statute, the equivalent there provided, of citation on and execution of the summonses, ought to be considered as in all cases indispensable. Neither should there be any dispensation with the *induciae* under the summonses.

ANNUS DE-
LIBERANDI.

Formerly, no step could be taken against the heir till expiry of a year after his ancestor's death, being the period (called the *annus deliberandi*) during which he was entitled to consider whether to enter himself heir to his ancestor. Now, the period allowed for deliberation is limited to six months from the date of the party becoming apparent-heir.¹

ULTIMA
HÆRES.

When the obligation, or imperfect disposition, has been granted by one who has no heirs, the adjudication will be led against the Crown officers, as against the Crown as *ultima hæres*; and here a decree of constitution must be obtained before the summons of adjudication is raised. There was never in this case a general or special charge in the older form, nor is any equivalent now necessary or competent.

OBLIGATION
OF HEIR
UNENTERED.

Adjudication in implement is competent against an heir unentered on his own obligation or disposition, as well as on his predecessor's. But, when his own deed is the ground of the action, it is unnecessary either to fix the representation, or to constitute the obligation. By granting the deed, he has not only professed his heirship, in regard to the particular subject-matter of the deed, but has constituted or undertaken the obligation. The special, or general special charge, was formerly necessary in form, as it still is in principle, to supply, *fictione juris*, the want of the heir's title to the lands; but the execution of the summons of adjudication is now equivalent to the execution of the special, or general special charge; and the adjudication, therefore, alone is required in this case.

Adjudication in implement is competent where the imperfect deed is a bond and disposition in security, or an obligation to grant a feu-dispo-

¹ Titles Acts 1858, s. 27; and 1860, s. 16.

sition, equally as in the case of an absolute and ordinary disposition. And when an heir of entail incurs an irritancy, and the estate is forfeited to the next heir, adjudication at the instance of such next heir is a competent form of obtaining a title in his person. In all these cases the process will be similar to that we have been examining; the decree, in the case of the bond and disposition in security, will adjudge the lands in security only; in the case of the feu-disposition, it will adjudge the lands to be held feu; and, in the case of the entail, it will adjudge them subject to the conditions of the entail.

In terms of the Act 1661, cap. 31, an abbreviate of the decree ought to be signed by the extractor, and recorded in the Register of Abbreviates of Adjudications within sixty days of its date.¹ Where the adjudication is *contra hæreditatem jacentem*, the process is competent before the Sheriff of the defender's domicile.² But horning against superiors cannot be obtained on a Sheriff's decree of adjudication *contra hæreditatem jacentem*, unless there is an abbreviate recorded.³ If, however, the adjudication is followed by infeftment, to which registration is in most cases now equivalent, it does not appear that the failure to record the abbreviate is of importance.⁴ An error in the record of the abbreviate may be corrected by the authority of the Court of Session.⁵ But an essential error, in setting forth the grounds of the action, will vitiate the whole procedure.⁶

If the decree is followed by registration or sasine, the date of recording the decree or sasine appears to be the criterion of preference among adjudgers. But where the superior of feudal subjects, through whom alone, as the law formerly stood, a real right in such subjects could be obtained, refused to grant a charter to the first adjudger, and shortly afterwards granted a charter to himself, though a posterior adjudger, the first adjudger was preferred, though not first infeft; because the superior was not entitled to use his position as superior for his own benefit, in prejudice of a lawful claim by a third party.⁷ When neither adjudger is infeft, he who has first charged the superior to enter him has the preference.⁸ In a recent case, however, the Court threw out a second and competing adjudication of lands, founded on a disposition *omnium bonorum*, granted by the person feudally vested in the land. The Court had previously given decree in implement of a special minute of sale, entered into between said person and a purchaser of the lands, and bearing date prior to the disposition *omnium bonorum*. The disposition *omnium bonorum* ought clearly not to have been held as comprehending the granter's lands previously sold; and the Court apparently proceeded on the ground that their granting of successive decrees,

¹ Guthries, 20th Feb. 1741, M. 204.

² Ker, 4th Jan. 1709, M. 46.

³ Erskine, ii. 12. 54, and authorities there cited.

⁴ Charteris, 2d Feb. 1714, 5 Br. Sup. 102.

⁵ Steven, 14th June 1848, 10 D. 1287.

⁶ Wilkie, 5th March 1850, 12 D. 818. The error here occurred in specifying erroneously the date of one of the deeds founded on.

⁷ M'Gregor, 9th March 1843, 5 D. 888.

⁸ Sinclair, 21st June 1704, M. 56.

each containing the full and irredeemable right to the same lands, in implement of successive dispositions to different parties, would be equivalent to their granting successive dispositions to such parties of such lands.¹

The adjudication in implement being equivalent to an absolute disposition, there is no room for the *pari passu* preference established as to adjudications for debt by the Act of 1661, cap. 62.

It is not settled whether the superior can be compelled to enter an adjudger in implement of an absolute obligation to convey, when such adjudger cannot instruct his predecessor's right. The superior is so bound in the case of an adjudger for debt; but the adjudger in implement of an absolute obligation is proprietor, and is entitled to have possession of the writs. He ought therefore to be able to instruct his predecessor's title.²

¹ Wright, 29th June 1821, 1 Sh. 93.

² Alexander, 25th June 1848, 3 D. 1098.

CHAPTER IV.

WE now come to the proper Judicial Sale, authorized by the Act JUDICIAL SALE. 1681, cap. 17.

The law of Scotland has, from a very early period, given effect to the principle that a debtor's lands may be sold under authority of a Court of Law, and the price applied at the sight of such Court in payment of the proprietor's debts, when a case of bankruptcy arises. This important fact is noticed by the Lord Justice-Clerk Inglis in the address which he delivered to the Juridical Society in November 1863, and in which he justly remarked that in this process, which the Scottish Parliament introduced nearly two hundred years ago, we see substantially that which was not very long ago done for Ireland by the Encumbered Estates Act. With us, since the process of sequestration has been made available in cases of deceased debtors, and still more since its scope has been enlarged, as by the Bankrupt Act of 1856, so as to include all persons resident within the jurisdiction of the Supreme Courts of Scotland, judicial sale, on account of mere bankruptcy, must rarely occur. But it will occasionally have to be resorted to; and, as titles obtained at judicial sales are met with not unfrequently in practice, it is necessary to be acquainted with the procedure to be followed in conducting such sales, and in examining titles founded upon them.

The sale of the debtor's lands, to satisfy his creditors, was part of the Common or customary Law of Scotland before the time of Alexander II. An Act, in his reign, printed in Thomson's Edition of the Statutes,¹ appoints that, when debtors and their tenants have not moveable goods, the Sheriff and his officers shall, after fifteen days' notice to the debtor, sell enough of his land to satisfy the creditor of his principal sum, with damages, expenses, and interest. And it is curious to observe what that Act says regarding the purchaser's title and infeftment. It provides that, if the lands are held of the Crown, the Sheriff shall infeft the purchaser by the King's charter and warrant. If the lands are held of a baron who wishes to purchase, such baron is entitled to have them; and, if he declines them at the King's price, the Sheriff shall infeft the purchaser, in the manner in which the debtor held, with his rights and whole pertinents. The baron, however, is to accept the purchaser, at the command of the Sheriff, and give him the debtor's original sasine, without any obstacle or question whatever.

We have here, therefore, evidence of the feudal holding, but a distinct obligation on the superior, if he himself declines the first offer of pur-

¹ Thomson's Acts, i. 371.

chase, to receive the purchaser at the judicial sale as his vassal, and without any stipulation for payment of casualty or entry-money. We have also authority to the Sheriff to infest the purchaser,—a principle which, after being in long abeyance, except as to lands held of the Crown as superior, was revived in the Transference of Lands Act of 1847, cap. 48.

1469, c. 36. The transference of the lands, in terms of King Alexander's Act, was absolute and irredeemable. By the Act 1469, cap. 36 (whilst the tenants were protected against distress for more than the rent due by them), the proprietor was declared entitled to redeem the land, within seven years, by paying to the buyer the money it was sold for, and the expenses of the overlord's charter and sasine thereon. If no buyer was found, the sheriff was to choose thirteen men, and apprise the land, and assign to the creditor land to the value of his debt. Here, again, we find the overlord, or superior, bound to receive the creditor, or purchaser, but, on this occasion, only on payment of a year's rent; failing whereof he was to take the lands and undergang the debts.

1672, c. 19. In consequence of this Statute, the action of sale to third parties, purchasers, was virtually abolished; the debtor's right of redemption preventing such parties from purchasing. And the apprising to the creditors, which fell into the hands of messengers-at-arms, led to great abuses. Matters, however, continued on this footing for more than two hundred years; that is, until the passing of the Act 1672, cap. 19, which substituted adjudication for sale and apprising. By that Act, power of redemption was reserved to the debtor for five years, if the adjudication was special;—that is, of a particular portion of his lands expressly in satisfaction of the debt;—and for ten years if the adjudication was general, and embraced the whole lands without any provision that they were to be taken in satisfaction of the debt.

1681, c. 17.
1690, c. 20. This new mode of attachment for debt, however, was liable to the material defect, that where there were several creditors, with *pari passu* preferences, the only way they had for obtaining payment was to enter jointly into possession of the debtor's lands. In order to remedy this inconvenience, the process of judicial sale was instituted, first, by the Act 1681, cap. 17, and, more effectively, by 1690, cap. 20. Under these Acts, it was made competent to any creditor, having a real right,—that is, an adjudication, or a bond and disposition in security, with infestment,—to pursue a process of ranking of the creditors, and sale of the debtor's lands, provided the debtor was notoriously bankrupt, and the creditors in possession of the estate. The lands were to be valued by the Lords of Session, and exposed to sale at the values ascertained by them. The sale was to be by public roup, after full intimation; and it was declared as effectual as if made by the debtor himself, and by all the creditors cited in the action. The purchaser was, thereupon, to be entered with the Crown in usual form, and with other superiors on payment of a year's rent. The price was to be distributed among the

creditors, according to the amount of their debts, and their rights and diligences.

The process we are now describing has thus three distinct objects, viz.,—(1.) the sale, with the judicial transfer or adjudication of the estate to the purchaser irredeemably; (2.) the ranking of the creditors upon the price; and (3.) the distribution of the price among the creditors in their order of ranking. For these purposes, separate actions were at first required, the first being an action of sale; secondly, an action of reduction-improbation, calling on the creditors to produce their grounds of debt, on pain of having them declared null if not produced; and, thirdly, a multiplepinding to distribute the price. These actions are now superseded by the single process of ranking and sale, the form of which is regulated by the Court of Session Act,¹ and relative Act of RANKING AND SALE. Sederunt.²

For a long time the action of ranking of the creditors necessarily preceded the action of sale; but by 19 & 20 Vict. cap. 91, sect. 2, in conformity with previous Statutes, the sale may proceed whether the ranking is concluded or not. The right to pursue the action belongs only to a creditor who holds a real security over the lands to be sold. The defenders in the action are the common debtor, or, if he is dead, his apparent heir, and all the real creditors in possession. These must all be made parties expressly, and by special citation, or its equivalent; personal creditors are called generally, but only by edictal citation. If the debtor, or any creditor defender, shall die during the action, the process goes on notwithstanding, as soon as the heir of such party is called, which is done by letters of diligence to cite the heir, and also his tutors and curators, if he is a minor.³ It is indispensable, however, that the creditor pursuer, or some other creditor, be in possession of the lands. For such possession, an action of maills and duties (a suit by which a creditor obtains right to levy the rents) is sufficient; and the creditors are likewise held to be in possession when the rents are sequestered,—that is, judicially set apart as a fund for distribution by the Court,—a step which may be resorted to whenever the estate is the subject of judicial competition.

It is necessary also that the debtor be 'notoriously bankrupt.' The PROOF OF BANKRUPTCY. proof of bankruptcy is therefore a necessary preliminary before proceeding with a sale; and the Act 19 & 20 Vict. cap. 91, sect. 3, provides, in conformity with previous Acts, two special tests of bankruptcy, which supersede further proof while they exist, viz.,—(1.) the case where the interest of the debts, and the other annual burdens, exceed the yearly income of the property under sale; (2.) where a sequestration shall have taken place. If neither of these tests occurs, proof *proul de jure* will take place, which will be conducted by a commissioner appointed by the Lord Ordinary.

¹ 13 & 14 Vict. c. 36.

² Act of Sederunt, 31st Oct. 1850.

³ Act of Sederunt, 23d Nov. 1711; Keith, 27th Nov. 1776, 5 Br. Sup. 562.

The process of sale must include the whole lands known to belong to the bankrupt.¹ It is sufficient, however, to enumerate all the lands known to the pursuer, adding a general clause of all the other heritable subjects pertaining to the bankrupt, or to which he shall succeed; and this is accordingly done.² The commissioner, in the proof of the value of the lands, examines, upon oath, land-valuators and other qualified persons. It is indispensable that the witnesses be examined upon oath; and the proof must bear that they were so.³ The holding and feudal burdens are usually instructed by producing the titles; and proof is also taken of the minister's stipend, schoolmaster's salary, and other annual burdens. The production of the titles, however, is not absolutely necessary; and where, from being hypothecated, they cannot be produced, the action may still competently proceed.⁴

SALE. The result of the proof is embodied in a memorial and abstract, prepared by the common agent in the process for the information of the Court, and which the Court remit to the Lord Ordinary for examination, and to report. The Court, when satisfied as to the value, fix the upset price, order the sale to proceed in the Parliament House, on a day specified, before the Lord Ordinary, and grant warrant for intimation and edictal citation in terms of the Act of Sederunt, 24th September 1838. The Court will not allow the sale to be carried on elsewhere than in the Parliament House.⁵ On the day appointed, the Lord Ordinary puts up the lands to sale within the Parliament House. Should a sale not take place at the first exposure, the Court do not parcel out the estate among the creditors, as the Act of 1681 empowers them to do. They reduce the upset price and expose anew after proper intimation.⁶

When a sale takes place, the Court adjudge, that is, judicially dispose, to the highest bidder the irredeemable property, or such interest as the debtor had in the lands. If the debtor be an heir of entail, the lands will be adjudged with all right which he had, but not including any right which, if adjudged, would infer an irritancy of his right as heir of entail. The effect of the sale in such case is limited to the life-interest of the debtor.⁷ In one case, upon special application, the Court adopted a fuller form of decree than was usual.⁸

**CONSIGNATION
OF PRICE.**

The decree of sale may be extracted as soon as the purchaser finds caution for the price to the satisfaction of the Court; but the sale is not held to be completed until the price is actually paid, or consigned in bank, in terms of the articles of roup, which will give power to the purchaser to make consignation in one or other of the joint-stock banks of issue in Scotland, in terms of the Act 19 & 20 Vict. cap. 91, sect. 2; and that at any term of Whitsunday or Martinmas after the term of

¹ Macpherson, 25th Dec. 1784, M. 13,336.

² Act of Sederunt, 17th Jan. 1756, s. 12.

³ A. B., 20th Feb. 1838, 16 Sh. 630.

⁴ Findlay, 20th July 1842, 4 D. 1550; affirmed, 10th July 1845, 4 Bell's App. 361.

⁵ Renny, 22d Feb. 1834, 12 Sh. 479.

⁶ Creditors of Cleland, 7th July 1709, Fountainhall, ii. 512; Murray, 9th Feb. 1837, 15 Sh. 499.

⁷ Scottish Union Insurance Company, 19th Jan. 1839, 1 D. 532.

⁸ Swete, 20th Feb. 1849, 11 D. 679.

payment of the price; on doing which, and giving notice to the agent who carried on the sale, the purchaser is discharged of the price. And the Court may require the purchaser so to consign. When the purchaser has the amount of the price lying at call in bank, and in other cases, it might be a benefit to him to consign immediately after the purchase; but this will not be allowed;¹ and generally the Court will not sanction any deviation from the articles of roup.²

After consignation the purchaser can obtain an order from the Court for getting up his bond of caution. When the lands are sold in lots or parcels, and there are more purchasers, and consequently more bonds of caution to be got up than one, there must be a separate application by each purchaser in reference to the bond for his own purchase.³

The decree of sale is equivalent to an irredeemable adjudication or disposition of the lands, exonerated and discharged of all debts and deeds of the bankrupt or his predecessors. And the modes by which the purchaser can complete his titles, whether to lands held by burgage or other tenures, are exactly similar to those already explained with reference to the decree of adjudication in implement of an absolute obligation to convey. When the purchaser at a judicial sale enters with the superior, his charter is called a Charter of Sale; and the *quæquidem* narrates the decree of sale as its warrant, as the charter of adjudication does the decree of adjudication.

EFFECT OF
DECREE OF
SALE.

CHARTER OF
SALE.

By the Titles Act of 1858, sect. 10, it is declared competent and sufficient, in all charters by progress, to refer to the *tenendas* and *reddendo* of the lands, as set forth at length in any charter or other writ recorded in any public register; and superiors can be required to grant such charters, containing such reference, in like manner as they were formerly bound to grant similar charters according to the forms previously in use.

And, by the Act of 1860, sect. 39, charters of adjudication, or of sale, operate as a confirmation of the whole deeds and instruments necessary to be confirmed in order to complete the investiture of the grantee. Confirmation of writs, therefore, is not required in any such charter granted after the Act of 1860 came into operation.

When lands are sold judicially, the price is applicable, at the sight and under the orders of the Court, in payment of the debts affecting the lands, but the debts are not simply discharged. They are kept up, to a certain effect, and made to operate a collateral security to the purchaser. That result is brought about by the joint operation of two measures:— (1.) The summons of ranking and sale against the creditors calls for production of all their grounds of debt, diligences, etc., with certification that, if not produced, they shall be held as false and forged; and if the creditors do not produce them within a limited time, fixed by the Court

APPLICATION
OF PRICE.

¹ *Hunters & Co.*, 16th Jan. 1829, 7 Sh. 270.

² *Rose*, 10th July 1835, 13 Sh. 1094.

³ *Learmonth*, 16th June 1838, 16 Sh. 1144.

and intimated, the securities are reduced, as far as the purchaser and the creditors producing their titles are concerned.¹ And (2.) the decree of sale, in terms of the Act of Sederunt 31st March 1685, ordains the creditors who produce their securities to grant assignations of their debts and diligences to the purchaser, in corroboration of his title, with absolute warrandice to the extent of the sums received by them respectively. In case of eviction of the estate, the creditors are bound to repay these sums to the purchaser. The application of the price in payment of the debts, therefore, gives him collateral security of his purchase. But the debts, though thus assigned for the purpose of supporting the title of the purchaser, are extinguished to every other effect; and, in particular, they cannot be assigned by the purchaser to third parties, so as to afford to them security over the lands.² But, as regards the right to the lands, the purchaser only comes in place of the bankrupt. The decree of sale operates only a conveyance from the bankrupt; and any party who can establish a title preferable to that of the bankrupt will exclude the purchaser.³

The real creditors are ranked and preferred on the price according to the priority of their infestments; and a creditor whose sasine was found to be inept was excluded from all preference.⁴ If the creditors are paid under an erroneous view of their rights and preferences, they will be compelled to repeat.⁵

A heritable creditor, having power to sell, and in the course of exercising that power, is not hindered from proceeding, by an action of ranking and sale at the instance of another creditor.⁶

The holder of missives of sale, of any part of the subjects contained in the summons of ranking and sale, is entitled to adjudge in implement of the missives, to the effect of excluding the lands from the decree of sale.⁷

COMMON AGENT.

The interest of the creditors generally is provided for, and the procedure simplified, by the appointment of a common agent, who is elected by the creditors to conduct the case, and to act for their common behoof. His duties are prescribed by Act of Sederunt.⁸ These embrace generally all that is necessary for the security and interest of the creditors; and, as he is a species of trustee for them, and specially is bound to act so as to insure the lands bringing as large a price as possible, he is not entitled to be himself the purchaser at the sale.⁹

SURPLUS PRICE.

If there is any surplus of the price after satisfying all the debts, and

¹ Act of Sederunt, 17th Jan. 1756.

² Seton, 10th July 1788, M. 13,371; affirmed 7th April 1789, 3 Paton's App. 682.

³ Urquhart, 28th July 1753, M. 9922.

⁴ Mackintosh, 17th November 1825, 4 Sh. 190.

⁵ Keith, 14th Nov. 1792, M. 2933

⁶ Simson, 25th November 1831, 10 Sh. 66.

⁷ Wood, 5th Feb. 1833, 11 Sh. 355.

⁸ Act of Sederunt, 17th Jan. 1756, and 11th July 1794.

⁹ York Buildings Co., 8th March 1793, M. 13,367; reversed 13th May 1795, 3 Paton's App. 378.

if such surplus falls to the debtor's heir, he must make up a title to the lands to enable him to receive it.¹

There is next to be explained the process of Cognition and Sale of a pupil's lands, at the instance of a pupil and his tutors, which the Court will authorize when the estate is so overloaded with debt that there is no hope of extricating it without a sale. The summons sets forth the pupil's title, the extent of his succession, heritable and moveable, and that the interest of the debts, and the other annual charges, are equal or nearly equal to, or that they exceed, the rents; that thus there are no funds to aliment the pupil; and that the creditors threaten to adjudge. The summons therefore concludes that the Court shall take cognition of the amount of debts and yearly value of the lands, and that the creditors shall be ordained to exhibit their grounds of debt and diligences. There is then a conclusion that a sale is necessary, and for warrant to the tutors to dispoise the lands and grant conveyances, the same being declared to be as effectual as if granted by the pupil after majority.

It is only after full inquiry made in terms of these conclusions, and in the event of urgent necessity being established, that the Court will authorize the sale of a pupil's estate under this process.² There is here, however, no judicial act of transmission, no decree of sale. Titles to the lands must be made up in the person of the pupil; and the sale is carried into effect by a disposition from the tutors, as empowered by the Court.

We shall next notice the Judicial Sale of lands at the instance of an Apparent Heir, that is, an heir who has succeeded to the lands by the death of his ancestor, but has not made up any title in his person. This is authorized by the Act 1695, cap. 24, and is competent whether the estate is bankrupt or not; no third party having an interest to object. The privilege is lost by the heir obtaining himself served as such to his ancestor, provided the service is of such a character as to involve universal liability for the ancestor's debts. The heir in such case is no longer merely apparent, nor is he free of liability for his ancestor's debts. He has both served himself heir and made the debts his own. But the passive title and liability arising by behaviour as heir, and where there has been no service, does not exclude the right to bring the action;³ nor even service as heir *cum beneficio inventarii*, that is, with liability limited to the value of the subjects specified in an inventory or schedule signed and recorded before the service is expedite. On the same principle, service with specification annexed, in terms of the Service of Heirs Act of 1847,⁴ ought not to exclude the privilege; neither ought a decree of special

¹ Stirling, 21st July 1742, Elchies, *voce* Ranking and Sale, 8, and (more fully) M. 14,436.

² Finlayson, 22d Dec. 1810, F. C.

³ Blair, 28th Feb. 1733, M. 5247.

⁴ 10 & 11 Vict. c. 47, s. 25.

service, unless followed by registration or sasine.¹ Nor is the heir's right to bring the action excluded even when he has renounced to be heir, in an action of constitution against him at the instance of an ancestor's creditor.² The action is competent, likewise, though the estate be subject to an entail, if the entail is not recorded.³

The creditors are not entitled to interfere with the right of the heir to carry on the sale.⁴ And upon the death of the original pursuer, after a sale had taken place, the next apparent heir and the purchaser have been found entitled to carry on the action.⁵

The summons is similar to that raised by a creditor, except that there is no allegation or proof of bankruptcy required; the proof in the case under consideration is limited to the value of the lands. The sale proceeds in the same form and way as when a creditor raises the process; and the purchaser obtains and completes a title in the same form and way, and with the same securities, in the one case as in the other. And if the sale is by a party *bond fide* believed to be the heir, and who, after the sale, has completed titles as heir, a nearer heir subsequently appearing will have no recourse upon the purchaser after he has paid the price. The sale is for the ancestor's debts; and no one claiming through the ancestor can come upon the purchaser except for the price.⁶

Should there be any reversion of the price after satisfying the ancestor's debts, it belongs to the heir, who is entitled to payment without making up any title to the lands. The decree of sale in this case is an adjudication for the general behoof, and a sufficient title for the heir to take up such reversion.⁷

DIVISION AND SALE.

We have, lastly, the action of Division, or of Division and Sale, at the instance of heirs-portioners, or joint proprietors,—which is an Outer House process.⁸

This does not apply in the case of a loch belonging as a common property to the several owners of the surrounding lands; nor is it competent in the case of a right of superiority which has devolved on two or more heirs-portioners; and there may be other cases in which the right to bring an action of division and sale of common property is excluded. But, as a general rule, when two or more parties have right, jointly and *pro indiviso*, to the same subject, it is competent for them to apply to the Court of Session for judicial division thereof, if, as in the case of land, division is practicable; but if, as in the case of a single dwelling-house, it is not, then the application is for the sale of the whole, and division of the price. Such action is competent to one

¹ 10 & 11 Vict. c. 47, s. 23.

² Smith, 3d March 1854, 16 D. 727; Belshier, March 1776, 5 Br. Sup. 561.

³ Mitchell, 4th Feb. 1809, F. C.

⁴ Hamilton's Creditors, 29th June 1749, M. 13,323.

⁵ A. v. B. (without date), Elchies, voce Ranking and Sale, 22.

⁶ Middlemore, 5th March 1811, F. C.

⁷ Middlemore, 2d Feb. 1803, M. App. Heir-Apparent, 2.

⁸ Macbride, 19th Feb. 1862, 24 D. 546.

having right to a *pro indiviso* share of lands though he holds only as a trustee.¹

The sale under this process is not properly judicial ; it is not made by the Court, but by the parties under the order and authority of the Court. The Court will not authorize a sale without proof that division cannot be accomplished. This proof is required even when there is no appearance on the part of the defender.²

¹ Craig, 14th March, 1863, 1 Macph. 612.

and Lord Rutherford in Brock, reported

² Bryden, 4th Feb. 1837, 15 Sh. 486 ; in connexion with Anderson's case, 19 D. Anderson, 11th March 1857, 19 D. 700 ; 701.

BRANCH IV.

DEEDS GENERALLY RELATING TO BOTH PERSONAL AND HERITABLE ESTATE, AND OTHER DEEDS NOT FALLING UNDER ANY OF THE FOREGOING BRANCHES.

TITLE I.

FORMS OF DESTINATION.

WE have now closed the subject of the transfer of lands *inter vivos* to third parties ; and, before entering on the concluding branch of the course, which embraces *mortis causâ* and testamentary deeds and writings, it will be desirable to consider the general operation and effect of certain forms of destination, one or other of which is frequently met with in practice. This is an extensive and important subject ; and the study of it, at the present stage, will be found useful when we enter on the terms of the settlements of lands in marriage contracts ; and still more in connexion with the entry of heirs ; because, when heirs are to enter, they have to transfer the fee or estate from the person in whom it last stood vested to their own persons. In particular cases, it is difficult to say in whom the fee stands vested ; and the rules of law applicable to special destinations thus require to be carefully examined.

In construing such destinations, there is one general principle to be kept in view as common to all cases ; viz., that effect is to be given to the intention of the maker of the deed, as far as such intention can be ascertained from the deed or deeds containing the destination.¹ It is not an exception to this rule, that when the maker of the deed uses technical terms—words having a stamped or stereotyped signification—such terms will in general be held as used with that signification, and no other ; because parties are supposed to know the meaning of such terms, and to intend, when employing them, that they shall have their fixed and accustomed signification, and no other. Though the general rule, however, of being guided by the parties' expressed intention, is beyond all question, its application is often difficult, particularly in cases of conjunct rights ; because the intention of the parties is frequently

¹ Erskine, iii. 8. 34.

obscurely expressed, and difficult of discovery. I first notice the case of conjunct rights in favour of husband and wife.

Where such rights relate to feudal subjects, or to the *quasi feuda* HUSBAND AND WIFE. of bonds, they usually import a fee in one only of the spouses ; and the general presumption is that the fee is in the husband, as the *dignior persona*, and that the wife's right is a liferent only. Thus, in reference to feudal subjects or bonds, there may be a destination to the husband and wife in conjunct fee, or in conjunct fee and liferent, or simply to the husband and wife, without mention of fee or liferent, and the heirs of their marriage, or to the heirs of their bodies, or their heirs indefinitely. Such destination does not import a joint right of fee, one half in each spouse ; neither is the fee in the heirs. As a general rule, in such cases the husband is the sole fiar, the wife only liferenter. The heirs of the marriage, or other heirs pointed out, have only a *spes successionis* ; though, when the destination occurs in an antenuptial contract, the heirs of the marriage cannot be gratuitously deprived of their succession. Moreover, the term 'their heirs,' in such destinations, means the heirs of the husband only.¹

But this general rule suffers limitation in several cases ; the limitations, like the rule itself, being all founded on the presumed intention of the parties in each case respectively. And, first, the law will hold the person, from or through whom the lands subject to the destination flowed, to be the fiar ; unless such lands came from the wife, and are meant as tocher ; or unless the deed containing the destination distinctly shows that the parties intended otherwise.² In Paterson's case, the wife destined her lands to her husband and herself in conjunct fee and liferent, and to the children of the marriage in fee. A sum of money was paid to the husband as tocher, so that the lands could not be claimed by him as tocher ; and the fee of the lands was held to be in the wife. Muirhead's case was affected by specialties ; but the general principle above stated was expressly recognised as one of the grounds of the decision. In a more recent case, this principle was allowed full weight, after much consideration and discussion. The property was the wife's by succession, and was conveyed by her and her husband to themselves, and longest liver of them two, in conjunct fee and liferent, and to the child or children procreated or to be procreated between them ; which failing, the longest liver of the spouses, and his or her heirs or assignees, in fee. There were children of the marriage. The wife died before her husband, who subsequently became bankrupt. The question then arose, whether, by the destination, the fee remained vested in the wife, and on her decease had fallen to the children as her heirs ; or whether the fee was in the husband, and by his bankruptcy transferred to his creditors. The claim of the children prevailed, because it was presumed that the wife did not intend

¹ Erskine, iii. 8. 36 ; Johnston, 19th June 1667, M. 4199 ; Watson, 18th July 1766, M. 4288 ; and Lord Brougham in

Forrester, 13th April 1835, 1 Sh. & M'L. 458.

² Paterson, 6th Dec. 1780, M. 4212 ; Muirhead, 16th Jan. 1824, 2 Sh. 617.

to denude herself of her property in favour of her husband; but in the case which happened, of there being children, to give him in the first place only the liferent, with a contingent right of succession to the fee, in case of the failure of the children of the marriage.¹ This case deserves careful perusal. The destination was peculiar, and the decision difficult; and you will find in it a full examination both of principles and authorities.

POWER OF
DISPOSAL.

When power of disposal is given to one of the spouses, it will *in dubio* be held that the fee was intended to be in the spouse on whom such power is conferred. Thus, where the wife's father destined his lands to the spouses and the heirs of their marriage; which failing, the wife, her heirs or assignees; the wife (though she predeceased her husband) was held to be *fiar*, because the ultimate destination was 'to her heirs or assignees, and none but who is *fiar* can assign.'² The wife's right of fee in this case appears to have been claimable also on the separate ground (afterwards referred to), that she and her heirs were the parties most favoured in the destination; they being the parties first called to succeed after the heirs of the marriage. Again, when the husband destined his property to himself and his wife in conjunct fee and liferent, with an express power to the wife to dispose at pleasure, such power, being incident to a right of fee, was held evidence of the intention to make the wife *fiar*.³ On the other hand (where the property came through the wife), the exclusion of the husband's creditors was considered an important element in the question, whether he was *fiar* or only liferenter.⁴ In Young's case, the spouses in their marriage-contract made a general settlement of all and sundry lands, etc., belonging to them at the time of the first deceiver's death, in favour of each other and the longest liver of them in liferent, and the children to be procreated of the marriage in fee. This general settlement was followed by the renunciation of the husband's *jus mariti*, and of every legal pretension competent to him by law, in consequence of the marriage, in reference to a certain particular fund derived from the wife. This fund was declared not affectable by the husband's debts or deeds, but intended for the subsistence of the spouses and their children. In these circumstances, the husband's right as to this particular fund was held to be a mere liferent. Two of the Judges say, 'How can a man be *fiar* of an estate which his creditors cannot touch?' But, though the right is derived through the wife, yet, if it be given with her in name of tocher, the fee will be held to be in the husband; because the tocher is intended to be his property.⁵

Another qualification of the general rules before stated arises, as already noticed, in favour of the spouse whose heirs are most favoured

¹ Myles, 12th Feb. 1857, 19 D. 408.

² Drover, 4th Feb. 1709, M. 4240.

³ Earl of Dunfermline, 27th June 1676, M. 2941 & 4244, etc.

⁴ Young, 2d Dec. 1835, 14 Sh. 85.

⁵ Gairns, 12th July 1671, M. 4230, 4231; Ramsay, 20th Dec. 1682, M. 4234; Creditors of Eliot, July 1720, M. 4244; Henderson, 20th Jan. 1790, M. 4215; affirmed 11th May 1791, 3 Paton's App. 686.

in the destination. This character of being most favoured is applied to the spouse whose heirs are first called after the immediate issue of the marriage, though the lands should be settled ultimately upon the heirs of the other.¹ In Cranston's case, the destination was to the husband and wife and longest liver in conjunct fee, and the heirs betwixt them; which failing, to the husband's heirs; which failing, the wife's heirs. The husband was held to be *fiar*.² In Earnslaw's case the fee was found to be in the husband, in virtue of a contract of marriage with a destination by the wife of her property to her husband in *liferent*, and the heirs to be procreated between them in fee; which failing, to the husband and his nearest heirs and assignees.

Again, where the conveyance (not being by way of *tocher*) is in TO SURVIVOR. favour of the spouses in conjunct fee and *liferent*, and the survivor of them, and their heirs or assignees; and where there is no further destination, preferring the heirs of the one over those of the other; the fee will belong to the survivor, whether husband or wife;—the destination to 'their heirs,' in such case, is held to mean the heirs of the longest liver.³

But where the destination, under a conveyance by the wife, in an antenuptial contract of marriage, was to the spouses in conjunct fee and *liferent*, and the survivor of them, and the heirs of the future marriage,—the fee was found to be in the husband, even though he predeceased his wife; because the heirs of the marriage were his heirs. The destination to the heirs of the survivor is, therefore, to be distinguished from the destination to the heirs of the marriage.⁴ And when lands destined to the spouses and the longest liver of them, and their heirs and assignees, were bought out of money settled in trust for behoof of the spouses in conjunct *liferent*, and the survivor of them in *liferent*, and the child or children of their marriage in fee, the destination of the lands was, in a question between the heir of the marriage and the surviving wife, held controlled by the terms of the settlement out of which they were purchased; and the surviving wife was held to have only a *liferent*.⁵

The rules above explained have reference to conjunct rights in feudal MOVEABLES. subjects, or the *quasi feuda* of bonds; and the general presumption, which in such cases is in favour of the husband, and against division of the subject between the heirs of the spouses, so as to give one-half to the heirs of each spouse, does not operate with equal force in the case of conveyances of proper moveable subjects. In such conveyances the words employed in the destination are more literally construed; feudal maxims have no place in connexion with proper moveables; and such subjects suffer a division more naturally than heritage. Indeed, in the case of moveables, division may be assumed as the intention of the

¹ Cranston, 20th Feb. 1667, M. 4227.

² See also Earnslaw, 21st Nov. 1705, M. 4223.

³ Erskine, iii. 8. 36; Forrester, 3d June 1831, 9 Sh. 675; affirmed 13th April 1835, 1 Sh. & M'L. App. 441.

⁴ Neilson, 14th March 1732, 1 Craigie & Stewart, 65. See also Lord Fullerton in Mackellar, 4th December 1840, 3 D. 172.

⁵ Murray, 19th May 1826, 4 Sh. 589.

parties.¹ In Bartilmo's case, the wife, by contract of marriage, disposed her goods and debts to her husband, to be enjoyed by him and her and the longest liver of them two during their lifetime, and, after their decease, to their heirs, executors, and assignees. The wife died first; there was no surviving issue of the marriage, and the above destination in favour of the husband was held to give him only a liferent. The destination to 'their heirs' was held to give the fee equally to the heirs of both spouses. From the report, it appears to have been expressly stated by the Court, that if the subjects had been heritage, the husband and his heirs only would have taken the whole fee. But, still, you will observe that the presumed intention formed the rule of the decision.

PARENT AND
CHILD.

I now take the case of conjunct rights in favour of parent and child.

In destinations to parents and children,—contained in conveyances by third parties, which are intended to receive instant effect by divesting the disponent of both fee and liferent, also in contracts of marriage, and conveyances though not by third parties, if intended to receive instant effect,—it is generally presumed to be the intention of parties that the fee shall be, or remain, with the parent; unless, from the tenor of the grant, the fee appears to have been intended to be given to the child.² A debtor granted bond for money stated to be borrowed from the father, 'for himself, and in name of his sons.' The bond was granted to the father, he being in life, and failing of him by decease to his sons *nominatim*—and the father was found to be fiar.³ The father is fiar also when in a deed by a third party, which is intended to receive instant effect by divesting such third party, lands are destined to the father in liferent, and to the heirs of his body, *nascituri*, in fee. Under such destination the children are only heirs of provision.⁴

The parent is again fiar when, in a deed from a third party, the destination is to him or her in liferent, and to his or her children in fee, and when the parent has express power of disposing of the property. Such power is not incident to a mere liferent; and, as it makes the right of fee given in terms to the children merely nominal, the nominal fiar has only a *spes successionis*. This holds although some of the children are in existence at the date of the deed.⁵ The rule holds even although the child described as fiar is mentioned by name in the destination.⁶

Again, where, in a deed by a third party, the destination is to the spouses and longest liver of them in conjunct fee and liferent, for the wife's liferent use allenary, and to a son *nominatim*, and his heirs or assignees in fee, but under the reserved power to the father of burdening or disposing of the subjects, the fee is in the father, in virtue not only

¹ Bartilmo, 2d Feb. 1632, M. 4222.

² Erskine, iii. 8. 35; Lord Fullerton in Mackellar, before quoted.

³ Lammington, 23d July 1675, M. 4252.

⁴ Frog, 25th Nov. 1735, M. 4262; Robertson, 20th Nov. 1806, M. App. Fiar,

Absolute and Limited, No. 2; Kennedy, 19th Feb. 1825, 3 Sh. 555.

⁵ Porterfield, 23d June 1779, M. 4277; affirmed 17th March 1780.

⁶ Cumming, 10th Feb. 1756, M. 4268 & 15,854; Baillie, 23d Feb. 1809, F. C.

of the reserved right, but of the express destination.¹ And when the deed is granted by the parent himself, and the destination is to the granter and spouse in conjunct fee and liferent, and to the granter's son or daughter in fee, the fee remains with the granter, although he does not specially reserve power of disposal; for the granter has the powers of *fiar* by virtue of the destination.²

It has likewise been decided, that when the destination was to the parent in liferent, and to the children, born or to be born, in fee (no child, however, being named), and when there were no taxative words, such as 'in liferent *allenary*,' excluding the parent from the fee, the fee was in the parent and not in the children;³ and this rule has been applied in cases where all the children to whom the fee was destined were in existence at the date of the disposition containing the above destination.⁴ The case of Cuthbertson further establishes that when lands are destined, by a *mortis causâ* deed, to a parent in liferent, and to the children of his or her marriage as a class, equally among them in fee, and, failing any of them by decease, to the others surviving, the right of a deceasing child transmits to the issue of such child, even though it never vested in the deceasing child; on the principle that the surviving children were called only under the implied condition that the children deceasing should die without issue.

But if the destination be to the parent in liferent, and to a child or children *nominatim* in fee, and if the powers of a *fiar* are not reserved to the parent, the ordinary rules of construction come into operation. The fee is in the child or children, and the parent is only liferenter; and this rule holds even if the deed is granted by the parent; assuming always that it has been delivered.⁵

If the destination is to the parent in liferent, and to a child or children already in existence *nominatim*, and to other children to be born in fee, the parent is still only liferenter. It has been said that the fee is in the children named, for themselves and those to be born.⁶ This rule received practical though not literal effect in the recent case of M'Gowan,⁷ where the destination in a conveyance by the wife in an antenuptial contract was to her intended husband and herself in conjunct fee and liferent, for their liferent use *allenary*, and to the husband's children by a former marriage *nominatim*, and the children to be procreated of the intended marriage in fee, share and share alike. The children of the first marriage, who were *nominatim* disponees of the fee, share and share alike with those to be born of the second marriage, were held to have a right of fee.

¹ Wilson, 14th Dec. 1819, F. C.

² Steele, 23d Jan. 1823, 2 Sh. 146.

³ Kennedy, before cited.

⁴ Cuthbertson, 1st March 1781, M. 4279; Lindsay, 9th Dec. 1807, M. App. Fiar, No. 1.

⁵ Mackintosh, 28th Jan. 1812, F. C.; Spence, 17th Nov. 1826, 5 Sh. 17; af-

firmed 25th March 1829, 3 Wil. & Sh. 380.

⁶ Lord Meadowbank in Dykes, 3d June 1813, F. C. His Lordship says, 'The whole fee is in them, subject to future births.'

⁷ M'Gowan, 14th Dec. 1862, 1 Macph. 141.

I have to call your attention, however, to the case of Campbell, reported by Lord Elchies as follows:¹—‘A disposition of some houses without either procuratory or precept being made to the disponent’s daughter for her own and children’s aliment in liferent, and to three children whom she then had, *nominatim*, and all other children that she should have in fee; and though several children were afterwards born besides those three, yet of the whole there having only two survived the mother, the Lords found that only these two had right to the subjects, and that equally, and that the children who died before their mother never had any right; for they considered this only as a personal deed or obligation, and not as establishing a present right of fee.’ The destination here appears to resemble that in Dykes’ and M’Gowan’s cases very nearly; and it is difficult to see why a right of fee should not have arisen to the *nominatim* disponees in the one case equally with the others. Lord Elchies in his ‘Notes’ gives as the reason in Campbell’s case, that ‘here no fee was conveyed, only an obligation to dispo.’ As a right of fee can be given under an obligation as well as under a disposition, this explanation hardly solves the difficulty. Moreover, the deed in Campbell’s case was actually a disposition; though, in respect that it contained neither procuratory of resignation nor precept of sasine, it could not, as the law then stood, be made use of, as in itself a warrant for a real right or infeftment, but was only the ground of an adjudication in implement. Perhaps the case went upon presumed intention. Except in so far as it may have done so, it appears to be now superseded as an authority by Dykes’ and M’Gowan’s cases.

LIFERENT
ALLENARLY.

If the subject is conveyed to the parent in liferent for his liferent use allenarly, this mode of expression has the effect, according to a uniform train of decisions, of restricting the parent’s beneficial right to a liferent, on the principle that the destination clearly shows the intention of the granter to have been that the parent should not have the fee. Lord Ivory holds this to be taken for granted in the case of Thomson;² and we have many decisions to the same effect.³ The same was held though the parent had power to burden the lands with provisions to younger children;⁴ and the like construction has been given to a destination to the parent ‘in liferent alimentary.’⁵

The parent’s right is also a mere liferent, when, in the destination of a sum of money, ‘the interest is to be liferented by the parents during their lives, and during the life of the survivor of them, and the principal sum to be the property of, and divisible amongst, the issue of the marriage, as their parents may direct; and, in default of issue, as the

¹ Campbell, 9th Nov. 1740; Elchies, Fiar, No. 6.

² Thomson, 4th February 1681, M. 4258.

³ See in particular Newlands, 9th July 1794, M. 4289; affirmed 26th April 1798; Watherstone, 25th Nov. 1801, M. 4297;

Thomson, 14th Dec. 1812, 1 Dow’s App. 417; Logan, 20th Dec. 1836, 15 Sh. 291; affirmed 1st Aug. 1839, M’L. & Robinson, 790.

⁴ M’Gowan, 16th November 1822, 2 Sh. 21.

⁵ Gerran, 14th June 1781, M. 4402.

'mother may direct.'¹ The parents here, you will observe, had merely the liferent of the interest, not the liferent of the principal sum; and, moreover, the principal was settled not upon 'their heirs,' but on 'the issue of the marriage.'

The parent is also restricted to a liferent, when by a special trust SPECIAL TRUST. the subjects of the destination are actually conveyed to, and vested in, trustees for behoof of him or her in liferent, and children in fee. This is strongly brought out by the case of Turnbull,² where there had been a marriage-contract conveying the lands, which belonged to the wife, to her in liferent, and the children of the marriage in fee. Under that deed the mother was fiar, and the children only heirs, with right to challenge gratuitous deeds to their prejudice. But the mother had subsequently disposed the lands to trustees, for payment of debts due at the date of the trust; to pay the surplus income to her; and, after the death of herself and her husband, to dispose the residue to the children of her marriage. The trustees were infeft, and the House of Lords held that, by the operation of the trust-deed (which was not only delivered, but had been followed by infestment), the mother was divested of the fee, and that the same belonged to the children. A mere trust-deed, however, for general purposes, with an order on the trustees to pay a legacy of a sum of money to a parent in liferent, and to his children *nascituri*, or, if existing, not named, in fee, at the first term of Whitsunday or Martinmas twelve months after the truster's death, and containing no directions to hold for behoof of the parties, is not enough to deprive the parent of his right of fee. Under such an order contained in a general trust-deed the parent is fiar, and the children are only conditional institutes. If their parent survives the term when the legacy is payable, they have no right of any kind *quâ* legatees of the truster.³

The parent is likewise divested of the fee, when, in a special trust by him, the conveyance to trustees is for him in liferent, and his children, though only *nascituri*, in fee.⁴ The trustees hold two separate estates or interests; one of liferent for the parent, the other of fee for the children *nascituri*.

The rule of construction of destination in favour of the parent in PRESUMED INTENTION. liferent, and his children *nascituri* or not named in fee, which gives the parent the full right of fee and the children a mere *spes successionis*, is said to be founded on two principles; one, the presumed intention of the parties, to which the Court will always give effect when such intention can be gathered from the deeds before them; the other, that the fee cannot be *in pendent*. It cannot 'hang in the air,' but must be in some existing individual.⁵ It is difficult, however, to allow to this feudal maxim the full effect ascribed to it in some at least of the cases we have

¹ Scott, 14th Feb. 1826, 4 Sh. 454; affirmed 14th May 1827, 2 Wil. & Sh. 550.

² Turnbull, 12th Nov. 1822, 2 Sh. 1; reversed 15th April 1825, 1 Wil. & Sh. 80.

³ Ferguson's Trustees, 13th July 1860, 22 D. 1442.

⁴ Seton, 6th March 1793, M. 4219.

⁵ Erskine, ii. l. 4.

been examining; because, as we have seen, whenever the word 'allenary,' or an equivalent expression, is added in reference to the liferent bestowed on the parent, the addition of the taxative word has been held to restrict the parent's beneficial right to a mere liferent. But precisely the same feudal difficulty arises as to the fee being '*in pendent*,' whether the word 'allenary' is employed or not. Where the children called as fiars are unborn or not named, there is just as much room for the feudal difficulty as to the fee being '*in pendent*' with a destination to the parent in liferent allenary, as to the parent simply in liferent. When in liferent allenary, the difficulty is overcome not by giving the fee to the parent absolutely, but by holding that a fiduciary fee has been constituted in him for behoof of the unborn children. It rather appears, therefore, that the presumed intention of the parties has, in the cases in question, been the main ground of decision. There is always a strong inherent presumption that a party, when bestowing a subject upon a father and his children, intends to bestow the whole right and interest in it upon the father himself in the first place, and to give nothing but a *spes successionis* to the children. And when the word 'allenary,' or some equivalent expression restricting the liferent in absolute terms, has not been used, the Court have held that the intention to restrict the parent to a mere liferent has not been so absolutely expressed as to overcome the inherent presumption above noticed. But this result arises from the circumstance that such words have not been employed as prove, beyond all doubt or question, that it was the granter's intention to limit the beneficial right bestowed on the parent to a mere liferent; and the contrary result takes place when the opposite intention is clearly demonstrated. It would, however, have been equally easy, so far as the feudal difficulty is concerned, to have made the parent fiduciary fiar in the one case as in the other; and it would seem that the rule of interpretation which makes the parent absolute fiar, though nominally liferenter, rests mainly upon the constructive intention of the maker of the deed. The principle, therefore, on which this point has been settled, seems to be, that effect is to be given to the presumed intention of the parties who made the destination under consideration. Whether the Court correctly construed the intention of such parties,—in reading the destination to a parent in liferent, and his children to be born, or not named, in fee, as giving the parent the absolute fee,—may well be doubted. But that point is now settled, beyond all dispute, in a Court of law. Such a destination, without the word 'allenary,' or some other equally taxative expression, gives the absolute fee to the parent. And, on the other hand, a destination to the parent in liferent 'allenary,' or with some equivalent limitation, and to the children, though not named, or even though unborn, in fee, restricts the parent's beneficial right to a liferent.

The rule, however, which makes a conveyance—from a third party, or by marriage-contract, or which is intended to have instant operation,—

in favour of the parent in liferent without taxative words, a constructive fee, is not to be applied to the case of dispositions by married persons to one another in liferent, and to their children to be born in fee; especially if proper *mortis causâ* and testamentary conveyances. There, on principle, as well as on the authority of practice, the term 'liferent' receives its natural and appropriate signification; leaving the fee (if there are no children who take it) in the person from whom the right flows.¹ Moreover, the case of a lease of a farm is to be distinguished from that LEASE. of a conveyance of lands, in reference to the rights and powers of the institute over the destination to a *nominatim* substitute, and the beneficial interest of such substitute. In the case of Macalister,² a lease for thirty-eight years was granted by trustees, in implement of the directions in a trust-settlement, to A. and B., spouses, and the longest liver of them, whom failing, to their son C., and his heirs and assignees. Had this destination occurred in a conveyance of lands, the spouses and the longest liver of them would have been entitled as fiars to alter it, and to defeat the right of C., either for onerous causes or gratuitously. But here C. was found to have right to succeed to the lease on the death of both A. and B.; and an attempt by B. (who survived A., and was unquestionably sole fiar at the time) to exclude C., by means of a sub-lease to a third party, was set aside as beyond the powers of the lessee under a lease with such a destination.

I now take the case of conjunct rights to parties not standing to each other in the relation of husband and wife, or parent and child; the CONJUNCT
RIGHTS
GENERALLY. leading rules regarding which appear to be as follows, viz. :—

(1.) When the destination is to A. and B. conjunctly, and their heirs and assignees,—the disponees named, and their heirs and assignees, are respectively proprietors to the extent of one-half *pro indiviso*, with full power of disposal thereof, independently of each other.³ (2.) When the destination is to A. and B., in conjunct fee and liferent, and their heirs,—the fee belongs to the disponees named, and their heirs, as above; but the survivor has the liferent right to the whole.⁴ (3.) When the destination is to A. and B., and the longest liver of them two, and their heirs, or their heirs and assignees—the words 'their heirs' are understood to denote the heirs of the longest liver; and the longest liver and his heirs will take the entire estate as sole fiars. But the creditors of each may attach his share.⁵ (4.) When the destination is to A. and B. jointly, and to B., if he shall survive, and his heirs,—the sole fee will fall to B., if he survives, subject to any deeds or debts of A. But if B. shall predecease, then the fee divides between A. and the heirs of B.⁶ (5.) When the destination is to A. and B. jointly, and to the heirs of A.,—the fee of the whole is in A., and B. has only a right of liferent.⁷

¹ Fraser, 27th March 1707, M. 4259; Mackellar, 4th Dec. 1840, 3 D. 172.

² Macalister, 22d Feb. 1859, 21 D. 560.

³ Erskine, iii. 8. 35.

⁴ *Ibid.*

⁵ Erskine, *ut supra*; Bisset, 26th Nov. 1799, M. App. Deathbed, No. 2.

⁶ Duff, p. 321.

⁷ Erskine, *ut supra*.

(6.) The same result appears to arise under the destination in an onerous, delivered, and irrevocable disposition *omnium bonorum*, by several persons to each other and to the heirs and assignees of the last survivor. Lord St. Leonards held a conveyance in these terms, granted by five sisters, as giving them a mere liferent whilst two or more of them survived, and as giving the entire fee to the last survivor.¹ The question arose upon a claim by the Inland Revenue Office to duty out of the estate of one of the disponers, who was also one of the joint-disponees, and who had died. In Scotland, the Court of Exchequer, whose judgment does not appear to be reported, decided in favour of the Crown; on the ground that the disposition, founded on as excluding the Crown, was a testamentary deed by the disponent who had died, as far as regarded her share; but the House of Lords reversed the Scotch decision. (7.) A destination to A. and B. and the longest liver of them in liferent, for their liferent use allennarly, and to the said A., and his heirs and assignees in fee, means, that A. and his heirs are alone the fiars; but the longest liver of A. and B. is liferenter of the whole, with a fiduciary fee for the heirs of A.² (8.) A destination to A. and B. equally in liferent, and to B. and his heirs in fee, will give A. the liferent of one-half only, and no more, in any event. The liferent of the other half, and the fee of the whole, will belong to B. and his heirs.³

But few questions in law have been more frequently agitated than the meaning and import of destinations, such as those we have been stating; and, as the great object is to find out, from the deeds applicable to each case respectively, the parties' intentions, even the same words occurring in different destinations will not always be allowed the same signification. Destinations expressed as above may, therefore, sometimes have a different construction put upon them from that now stated, which must be held as applicable only when no specialty occurs calling for such different construction. The case of Murray, already cited,⁴ is a good illustration of this remark; the destination, in a disposition of lands, having been there construed not according to its own terms, but with reference to a marriage-settlement, of which (though not referred to in it) it was held to be a part. And you must regard the only general rule or principle of construction in such cases to be the intention of the parties, competently expressed in the deed itself, or in some writing so connected with the deed as to form part of it.

I proceed to notice the ordinary distinctive meanings of the terms 'institute,' 'heir,' 'conditional institute,' and 'substitute.'

INSTITUTE.

The institute is the direct and immediate donee under a conveyance or other grant,—the person thereby first called to take the fee of the estate, or sum of money, or as the case may be. For example—(1.) 'I

¹ Brown, 28th June 1852, 1 Macq. 79.

² Duff, *ut supra*.

³ *Ibid.* Some other cases are given

in the last edition of the Juridical Styles, vol. i. p. 120.

⁴ *Ante*, p. 779, Note 5.

hereby dispone to A. B.'; or (2.) 'I hereby dispone to myself.' In the first case, A. B. is the institute; in the second case, the party himself is so. The institute may take from persons either living or dead; and, when he takes from the dead, he is often in common language called their heir; but he is in no respect heir in a technical sense. His right arises only by an express grant directly and immediately in his favour; and his title is purely private and extrajudicial. The lands (or as the case may be) have to be transferred from the deceased to him; but the transfer is accomplished solely by the private deed of the deceased, viz., his disposition, or other writing, which, as soon as delivered, operates to vest the estate or subjects disposed in the institute or disponent; just as when a person purchases a house or lands the disposition from the seller to him transfers the purchase to him.

The heir, again, properly so called, takes only from a person HEIR. deceased. He, like the institute, has to transfer lands (or as the case may be) from such deceased person to himself. But the deceased has not granted any disposition directly and immediately to the heir. The heir has no private title. His right arises by the operation of the law; and he can only accomplish the transfer from the deceased to himself, and obtain a title, by or in virtue of the judicial process called a service, —that is, the decree of a competent Court, whereby, on evidence adduced, he is found and declared to be the heir; or, as it is technically expressed, he is 'served' heir to the deceased. This explains the essential distinction, in a technical sense, between the institute and an heir;—the title of the institute is private, consisting of a disposition, or other deed, granted directly in his favour; the title of the heir is judicial, consisting of, or requiring as a step, a service.

The conditional institute is likewise a disponent (that is, he is not an CONDITIONAL INSTITUTE. heir in a technical sense). But a condition is attached to the conveyance of the estate in his favour. If such condition is purified, or if the contingency intended to be provided for never arises, the right of the conditional institute becomes simple and absolute. But if the condition comes into operation, its effect may be to deprive him of the estate altogether. This will depend on the terms in which the condition is expressed, the construction of which will always be in conformity with the party's supposed intention as expressed in the deed. Thus, if a party says, 'In case of my death, without leaving heirs of my body, I dispone to B.' this is a case of proper conditional institution. B. is institute or disponent, but subject to the condition or contingency of the death of the party without leaving heirs of his body. If such heirs never exist, or if they all predecease the disponent, the condition is purified, and B. is absolute and unqualified disponent. But, if the deed says no more than is above expressed, the existence of heirs of the body of the disponent, any of whom shall survive the disponent, will evacuate all right on the part of B., *quod* conditional institute or disponent, even if he shall survive

all the heirs of the body of the disponent.¹ Such heirs would, in the case put, take the estate not as disponees or institutes under the disposition, which is not granted in their favour, but as heirs under the prior investitures of the lands. They would make up their titles as heirs under such prior investitures; and, having done so, the lands upon their death would fall to their heirs, or to others as in their right. The disposition in favour of the conditional institute would never become a title to the estate at all; and this result would take place, though all the heirs of the prior investitures should die without having made up any titles in their persons. Their mere survivance of the disponent would prevent the condition contained in the disposition from being purified; and the person thereby called as conditional institute could never found upon that deed to any effect as a conveyance in his favour.

CONSTRUCTIVE
CONDITIONAL
INSTITUTE.

There are other cases in which parties are now usually called conditional institutes, although the deed on which they found does not contain, in terms, a disposition in their favour subject to an express condition; and the application of the term 'conditional institute,' in the cases here alluded to, is not yet universal. One of these cases is, when a party, by *mortis causa* disposition, creating no right until his death, disposes to A., and the heirs of his body, whom failing to B., etc., and when A. predeceases the testator, without leaving heirs of his body. On the death of the testator, the right under the disposition unquestionably devolves upon B.; but it has been questioned, and is not yet a point settled by any decision of the Court, whether, in the circumstances, B. is heir-substitute to A., the party named in the disposition as institute, and who would unquestionably have been institute if he had survived the testator; or whether A. having predeceased the testator without leaving heirs of his body, and so never having had any right under the disposition, B. is not to be held as conditional institute under the deed, the condition attaching to B.'s right being the failure of A., and of the heirs of his body, during the lifetime of the testator. The majority of the Court here, consulted under a remit from the House of Lords, in the case of *Fogo*,² were of opinion that B. was not an heir-substitute, but conditional institute, and that the destination was to be construed in the same way as if the testator had said, 'In case of the failure of A., and the heirs of his body, before me, then I dispose to B.,' etc., which last would have been a case of express conditional institution. The judgment of the Court of Session in this case was affirmed;³ but, owing to some peculiarities in the circumstances, the question, whether, under the destination as it stood, B. was truly conditional institute or a proper substitute did not require to be settled, and was not settled.

It appears to follow, in consistency with the opinions of the majority of the Court in *Fogo's* case, that, when the disposition is to the heirs of the testator's body (who never exist, or who prede-

¹ *Stevenson*, 24th July 1782, M. 14,862.

² 18th August 1843, 2 Bell's App. 195.

³ *Fogo*, 25th Feb. 1840, 2 D. 651; and continuation, 11th March 1842, 4 D. 1063.

cease the testator), whom failing, to B., etc., B. is conditional institute; the condition being the non-existence of heirs of the testator's body, or the failure of such heirs during the lifetime of the testator. In such a state of the facts, it appears to me that the destination is of the same import as if it had been in these terms :—' In case of the failure of heirs of my body before me, then I dispoise to B.,' and so forth.

There is, however, a material distinction between the two cases. At least the two forms of destination may have very different results. We have seen that, in the case of an express condition, the existence of the condition will entirely evacuate the right of the conditional institute, unless the deed, as a whole, shall show the intention of the testator to have been otherwise. But in the other cases noticed, which may be called those of 'constructive conditional institution,' the existence and succession of the parties first called will operate only the postponement of the right of B. and those called after him; it will not evacuate such right. In the case now supposed, viz. (a disposition to A. and the heirs of his body, whom failing to B.), the party first called, (A.), by surviving the testator, becomes the institute, and takes as such under the disposition. He does not take as heir under the prior investitures, as in the case of the express conditional institution. The disposition containing the destination to A. and the heirs of his body, whom failing to B., etc., thus becomes the ruling settlement of the estate, superseding the prior investitures; and B., in the case supposed, becomes a proper heir-substitute, entitled to succeed in case of the failure of the institute and prior heirs, if any; but such failure, though it must take place before he can succeed, will not make him institute under the disposition. After any one called before B. has obtained a vested right under the disposition, B. can never attain the character of institute under that deed. Two parties cannot have right in succession as institutes. If the party first called obtains a vested right as institute, no one else can take under the disposition, otherwise than as substitute heir to him and, if B. cannot establish the character of substitute heir under the disposition, he cannot take anything under that deed at all. But in the case supposed,—that is, on the failure of the institute and prior heirs, if any,—B. will take as heir-substitute to such of them as had last a vested right under the deed.

Substitutes are not donees in the technical sense of that term. SUBSTITUTES. They are the heirs called to the succession after, and in case of failure of, the institute or prior heirs-substitute. For example, when lands are disposed to A., who succeeds, whom failing to B., A. is the institute, and B. is the substitute, and will succeed on the death of A.; not, however, in the character of donee of the granter of the disposition, but as heir of the donee, or person holding a vested right under that deed.

And here you will recollect that, if the granter of a disposition disposes to himself and the heirs of his body, whom failing to B., the

disponer himself is the institute; and, whether heirs of his body exist or not, B. is a substitute heir. If heirs of the body of the disponent exist, B. is heir-substitute to them. If they do not exist, he is heir-substitute to the disponent himself.

'WHOM
FAILING.'

A substitution is usually marked by the words 'whom failing;' but these words are not necessary to make a substitution. A disposition to A. and the heirs of his body will make the heirs of the body substitutes, just as much as if the disposition were to A., 'whom failing' to the heirs of his body.¹ The great test of being the institute, or a substitute, under a disposition, is the necessity for a service to transfer the right from the dead to the living. The institute takes as disponent, and requires no service. The substitute is an heir, and must serve; though we shall probably find cases arise, in which, in order to make a title secure against all question, it is advisable for the party having right under a disposition to expedite a service as heir under that deed—even where it is thought that he is institute, and does not require to be served.

But, in construing such destinations as we are now dealing with, the intention of the parties, as conveyed by the whole deed, is to be looked to; and the meaning of expressions in the dispositive clause or destination, though it would be quite distinct if these expressions stood by themselves, may be controlled by other clauses, or by expressions in other parts of the deed.² In Smith's case, a party, by a *mortis causa* deed, disposed lands to his nephew, William Stewart, and the heirs of his body, 'whom failing before me, then' to Adam Stewart (William's brother) and the heirs of his body; 'whom also failing before me, then' to another brother, and the heirs of his body; 'whom all failing, then' to the testator's nearest heirs. In terms of the clause above quoted, William Stewart was the institute, or immediate and unconditional disponent; and Adam Stewart was called only in the event of his brother William and the heirs of William's body failing before the testator. In that contingency, Adam Stewart was institute; but, by the express words of the clause quoted, Adam Stewart was conditional institute; the condition attached to his right being that William Stewart and his issue should fail before the testator. The disposition, however, in all other parts or clauses, spoke of Adam Stewart, and those called after him, expressly as 'Adam, and the other substitutes above mentioned.' William Stewart survived the testator, and took the lands as disponent; but he died without issue, and a competition arose for the right of succession to him under the disposition. The decision turned mainly on the question, whether, according to the intention of the testator, Adam Stewart was a substitute, or only a conditional institute; and, looking to the whole scope of the deed, the Court by a majority found that the deed, as a whole, imported a substitution in his favour, and not a mere conditional institution.

¹ Duff, p. 326.

² See Smith, 14th Dec. 1839, 9 Sh. 180.

Before leaving the consideration of the terms 'conditional institute' LEGACIES. and 'substitute,' it may be observed that in grants of legacies a substitution does not operate in the same way as it does in connexion with heritable subjects. There can, in fact, be no proper substitution in an ordinary grant of legacy. Thus, when a legacy is granted to A., whom failing to B., the right of B. (which would be that of a substitute, were the deed applicable to heritage) is entirely dependent on the contingency of A. surviving the testator. If A. survives, he takes the legacy; and no right thereto can ever arise to B. in virtue of the grant. The legacy becomes the absolute property of A., by his survivance of the testator; and thenceforth it is part of A.'s estate, as fully as if there had been no substitution of B. in the grant. The substitution is evacuated by A.'s survivance. But if A. predeceases the testator, then B. takes the legacy as conditional institute; the condition being that A. shall predecease the testator.

TITLE II.

CONTRACTS OF MARRIAGE AND BONDS OF PROVISION.

CHAPTER I

THE general object of deeds granted in consideration of marriage is to substitute provisions, according to the views and circumstances of the parties, in lieu of those provisions which the law has made in favour of spouses and their children; and, before proceeding to examine the deeds usually executed in contemplation or in consequence of marriage, it is necessary to explain shortly what are the legal rights arising to spouses and children through marriage. These affect both the heritable and moveable estates of the spouses; and (where there is no provision to the contrary) they are, in the case of the husband—

JUS MARITI.

1. The *jus mariti*, which is defined by Erskine,¹ 'That right or interest accruing from the marriage to the husband, in the moveable estate which either belonged to the wife at the marriage, or shall be acquired by her standing the marriage.' As a general rule, and where the operation of the Conjugal Rights Amendment Act of 1861² does not interfere, this right carries to the husband, in virtue of a legal assignation implied in the marriage, his wife's moveable estate generally, including what really belonged to her, though her right may not have been discovered till after her death, by which time the *jus mariti* of course has come to an end. The *jus mariti* includes rents of lands, interest of money on bonds, and annuities due at the time of the marriage, and accruing until the dissolution thereof. But the moveable estate, in order so to fall to the husband, must be vested in the wife. Until so vested, it is not in law hers.³ The *jus mariti* does not give the husband any right of property in his wife's heritable estate; nor in the capital sums due by bonds, though personal, due to her, and of which the term of payment has come before the marriage, or before the right opened to the wife; nor in the wife's paraphernalia, which included the curious

¹ Erskine, i. 6. 13.

² 24 & 25 Vict. c. 86.

³ Erskine, *ut supra*, Note 146.

old gift, or rather perquisite (for it was capable of legal enforcement), known in our law by the name of 'The Lady's Gown,' which the purchaser of lands used to present to the seller's wife, upon her renouncing her contingent liferent right of terce, or any conventional liferent provision,—but which perquisite is now unknown in practice.

The *jus mariti* is further liable to be excluded (as explained in a former branch of the course¹) when a wife, deserted by her husband, shall have obtained an order of protection from the Court, under the provisions of the Conjugal Rights Amendment Act of 1861. 'Property which she has 'acquired or may acquire by her own industry, after such desertion, and 'property which she has succeeded to or may succeed to, or acquire right 'to, after such desertion,' 'shall' (by sect. 4) 'belong to her, as if she were 'unmarried;' subject to various contingent provisions expressed in the Act. The term 'desertion' here employed is not equivalent to the 'desertion' which may be a ground of divorce. It seems enough to make out a case of desertion, under the Act of 1861, that the husband shall, without reasonable cause, have left the country, and shall have little or no prospect of returning to his wife; and that she has been left unprovided for. Mere absence of the husband is not enough.² The order of protection, when made and intimated, is declared by the Act (sect. 5) 'to have the effect of a 'decree of separation *a mensâ et thoro*, in regard to the property, rights, 'and obligations of the husband and of the wife.' In like manner (by sect. 6) it is declared, that, 'after a decree of separation *a mensâ et thoro*, 'obtained at the instance of a wife, all property which she may acquire, 'or which may come to or devolve upon her, shall be held and considered 'as property belonging to her, in reference to which the *jus mariti* and 'husband's right of administration are excluded; and such property may 'be disposed of by her in all respects as if she were unmarried; and on 'her decease the same shall, in case she shall die intestate, pass to her 'heirs and representatives, in like manner as if her husband had been 'then dead.' This clause, likewise, is subject to various contingent provisions expressed in it. And, by sect. 16, 'when a married woman 'succeeds to property, or acquires right to it by donation, bequest, or 'any other means than by the exercise of her own industry, the husband 'or his creditors, or any other person claiming under or through him, 'shall not be entitled to claim the same, as falling within the *communio bonorum*, or under the *jus mariti* or husband's right of administration, 'except on the condition of making therefrom a reasonable provision for 'the support and maintenance of the wife, if a claim therefor be made 'on her behalf.' In case of dispute as to the amount of such provision, the matter is to 'be determined by the Court of Session, according to 'the circumstances of each case, and with reference to any provisions 'previously secured in favour of the wife, and any other property belonging 'to her, exempt from the *jus mariti*.' This enactment, likewise, is subject to various provisions expressed in the last-mentioned section (16).

¹ See *ante*, p. 124.

² Turnbull, 14th Jan. 1864, 2 Macph. 402.

RIGHT OF
ADMINIS-
TRATION.

2. The husband has likewise, by law, as curator of his wife during the marriage, the right of administration of her whole estate not falling to him absolutely by his *jus mariti*; as to which we went into some detail formerly, when on the subject of incapacitated persons. You will observe that the above Act, when brought into operation, excludes this right along with the *jus mariti*.

COURTESY.

3. Upon dissolution of the marriage by the wife's death, the husband has right, under the name of the courtesy, to the life interest of all the heritable estate, whether held by feudal or burgage tenure, to which his wife succeeded as an heir, and in which she died infest, provided there has been a living child born of the marriage, who is the mother's heir.¹ But if there shall be a child existing of a former marriage, who is the heir to the mother's heritable estate, the surviving husband of the second marriage has no right of courtesy. The right of courtesy, therefore, arises to the husband partly in respect of his being father of the heir, not solely in respect of his wife.² And the right of courtesy does not extend over conquest, that is, lands acquired by his wife otherwise than by succession. The wife's sasine, to which registration of the conveyance in her favour is now equivalent, is the measure of the courtesy; and her title, though defective, if not challenged in her lifetime when errors might have been remedied, is effectual to support the husband's right.³ The husband enters into possession without service; or rather he continues the possession which he had as husband of the deceased.

HUSBAND'S
LIABILITIES.

On the other hand, the husband becomes liable, by his marriage, for his wife's personal debts, and for the interest of heritable debts forming burdens on her estate. This liability continues during the subsistence of the marriage; and the courtesy is even affectable with the interest of the wife's personal debts, though with right of recourse against her estate, if any, not falling under its operation. With regard to this liability, however, you will recollect that the late Act, by sect. 5, provides that any order of protection, when 'made and intimated, shall have the effect of a decree of separation *a mensâ et thoro*, in regard to 'the property, rights, and obligations of the husband and of the wife;' and, independently of that Act, the husband's liability is subject to a considerable variety of qualifications, both for and against him. These you will find set forth in Mr. Fraser's book.⁴

RIGHTS OF
WIFE.

With regard to the wife, she may be said to have (independently of the late Act) no patrimonial right during the subsistence of the marriage, except as regards her own heritable and other estate, not falling to her husband by his *jus mariti*. She is proprietor of such estate, notwithstanding the marriage; and you will recollect that she can, by herself alone, and at her own pleasure, and independently of the Act, test upon her moveable estate; and also, if she is of full age, grant a *mortis causa* conveyance of her heritable estate, but not so as to affect her husband's

¹ Erskine, ii. 9. 53.² Darleith, 20th Feb. 1702, M. 3113.³ Hamilton, 15th June 1716, M. 3117.⁴ Fraser, i. 284, *et seq.*

contingent right of courtesy over the heritable estate, in case he shall survive her. The contingent rights conferred on her by the late Act are shown in the provisions of that Act already quoted.

Supposing she shall survive her husband, she has right, by law, to TERCE. the liferent of one-third part of the heritable estate in which he shall have died infest. This right of the wife is called her terce; that is, *tertia pars*. The husband's sasine, or registered conveyance, is the measure of the widow's terce. And, where lands are held by the husband on personal title only, the claim of terce does not arise,¹ unless sasine was fraudulently or wilfully omitted in order to injure the wife's claim.² Neither does the claim arise when the husband had only a nominal fee, and was in reality only an expectant heir of provision.³ But terce is not excluded or diminished by rights granted by the husband without his wife's consent, and not made real during his lifetime by sasine or its equivalent.⁴ And though the husband has granted an absolute disposition, on which sasine has followed, yet, if the purpose is only to create a security, terce will be allowed, under burden of the interest of the debt secured.⁵ I apprehend, however, that the right to terce will not arise in case of the dissolution of the marriage within year and day, and without a living child being born of it. The old law to this effect does not seem to be altered by the Moveable Succession Act of 1855.⁶

In order to make the right of the widow effectual, there ought to be first a service, and then a kenning, to the terce. SERVICE AND
KENNING TO
THE TERCE. The service is a process which follows on a writ issued from Chancery in the Sovereign's name, called a brieve of terce. This brieve is directed to the Sheriff of the county, or sometimes to a special commissioner as Sheriff in that part. It directs inquiry to be made by a jury of fifteen men, whether the widow was the lawful wife of the deceased, and whether the husband died seised of the lands specified in the brieve. The verdict of the jury, affirming the first inquiry and specifying the lands, gives the wife right to possess the lands *pro indiviso* with the heir; and by the process of kenning, which the Sheriff can be required to carry forward immediately after the service, the lands are divided between the wife for her third, and the heir for his two-thirds. Thereupon the wife has right during her life to the exclusive possession of her own divided third part; the heir having right to the exclusive possession of the two third-parts set apart to him.⁷ But the preferable right of the widow over disponees of her husband not infest or registered during her husband's lifetime, or over her husband's heir, and singular successors deriving right from such heir, depends on the husband's sasine, and is not injured although the disponee, or heir, or singular successor, shall be infest before she is

¹ Carruthers, 29th Jan. 1706, M. 15,846.

² Stair, ii. 6. 16; Erskine, ii. 9. 46.

³ Cumming, 10th Feb. 1756, M. 15,854.

⁴ M'Culloch, 10th July 1788, M. 15,866; Carlyle, 22d Jan. 1725, M. 15,851; and Erskine, *ut supra*.

⁵ Bartlet, 21st Feb. 1811, and 27th Nov. 1812; F. C.

⁶ 18 & 19 Vict. c. 23, s.

⁷ The various steps of procedure are detailed in Erskine, ii. 9. 50.

served.¹ It was decided in the case of M'Leish,² that, in case she is not served, her heirs cannot claim bygone terce, or share of rents, from a singular successor. But there the claim extended over twenty-seven years, during all which time, apparently, the widow was in a condition to have made her claim effectual. The case was thus very special, and its authority as a general rule is doubted.³

Terce is due out of real securities, created by infestment or equivalent registration.⁴ It has been doubted if it is due out of burdens constituted by reservation.⁵ A distinction has been suggested between burdens as to which the disponent's infestment is expressly reserved, and those which are created by merely burdening the infestment of another. The terce may reasonably be held to extend to the former. As to the latter, there may possibly be less room for the claim of terce.⁶ Terce affects houses and tenements in villages, and in burghs of regality and barony. With regard to burghs royal, the claim always affected such houses and tenements, if not held by the tenure of burgage; and now it affects them even when held burgage, where the husband died after 6th August 1861.⁷ It does not affect subjects held burgage when the husband died before that date. Terce does not affect superiorities, or the duties attaching to them.⁸ Neither does it affect leases, as not feudal or the subjects of infestment;⁹ nor coal, and perhaps the products of other mines, as being part of the soil, and not its annual increase;¹⁰ nor teinds, unless there is an infestment in them by erection.¹¹

COMMUNION OF GOODS.

As regards the proper moveable estate of the spouses, not including personal bonds overdue before the marriage, or before they devolved on the spouses, nor the wife's paraphernalia, but comprehending subjects heritable in their nature, if they form part of a copartnership stock,—a communion of goods arises by the marriage, in which the husband and wife, and their children, if any, are jointly interested. We have seen that when the contingencies provided for by the recent Act have not arisen, and when the Act has not been put in operation, the wife's moveable estate (other than as above) falls to the husband *jure mariti*, and that during the marriage he is, to all intents and purposes, proprietor of the whole goods in communion, as regards transactions *inter vivos*. But upon the dissolution of the marriage separate rights arise as to these goods.

If the husband is survived by wife and children, the goods in communion suffer a tripartite division upon his death; one-third falls, by law, to the widow as the *jus relictae*; one-third falls to the children

¹ Boyd, 7th March 1895, M. 15,874.

² M'Leish, 21st Feb. 1826, 4 Sh. 485.

³ More's Notes to Stair, p. 218.

⁴ Bell's Comm. i. 59; Felschier, 30th June 1779, M. 15,863.

⁵ Bell's Principles, s. 16f.).

⁶ Duff, p. 405.

⁷ Wallace, 28th June 1649, 1 Br. Sup.

395; Park, 15th Nov. 1769, M. 15,855;

Rose, 26th Jan. 1790, M. 15,867; 24 & 25 Vict. c. 86, s. 12.

⁸ Nisbett, 24th Feb. 1835, 13 Sh. 517.

⁹ Erskine, ii. 9. 49.

¹⁰ Belschier's case.

¹¹ Moncrief, 9th February 1667, M. 15,844.

who shall happen to survive him, as their legitim (*legitima pars liberorum*), LEGITIM. sometimes called also portion natural, or bairns' part of gear. The issue of such children as predecease their father take no share of the legitim. The remaining third, as well as any moveable estate of the husband not falling under the communion of goods,—all called the dead's part,—will be disposed of according as the husband shall have DEAD'S PART. directed by his will, or other deed. Failing direction by him, it will go to his children, other than the heir taking the heritage, if there is any heritage, equally among them as their father's next-of-kin; the issue of any child who has predeceased his father taking their parent's share in virtue of the Moveable Succession Act of 1855.¹ If there is heritage, the eldest son or heir taking it will be excluded from any share of the moveables, unless he shall collate,—that is, throw the heritable estate into a common fund with the moveable (not including the legitim); in which case he and all his brothers and sisters divide both the heritable and moveable estate (not including the legitim) equally among them, the issue of any predeceasing child taking their parent's share, as above.

If the husband dies survived by the wife, but without a surviving child, the division of the goods in communion is bipartite; the widow taking one-half as *jus relictæ*; the other half, with any moveable estate not included in the goods in communion, falling to the husband's next-of-kin, or otherwise as he shall have validly directed.

But, if the wife predeceases, the husband remains proprietor of the whole goods in communion during his life, just as he was whilst his wife was living; and the case is the same, in that respect, whether there are children of the marriage or not. Upon his death, the child or children then surviving, if any, will take one half of the goods in communion as legitim, to the exclusion of the issue of any child who has predeceased. The other half of the goods in communion, with the whole moveable estate not included in the goods in communion, will fall to the children as their father's next-of-kin, unless he shall have otherwise disposed of it; the issue of any predeceasing child taking their parent's portion as in their parent's right; and the eldest son, or heir in heritage, being excluded from participation in this half, unless he shall collate therewith the heritable estate, as above explained. The father cannot of himself, by any testamentary deed, affect the *jus relictæ* of his surviving wife; nor can either or both of the spouses, by such deed, affect the right of legitim of surviving children; although the father can, by such deed, dispose of the dead's part, including as before explained, at his pleasure.

The wife's moveable estate, not falling under either the *jus mariti* or communion of goods, can be disposed of by her, by *mortis causæ* deed, at her pleasure. Failing disposal, it will fall to her children in the same way, and subject to the same contingent exceptions, as those which we have seen affect the right of succession to the husband's dead's part.

¹ 18 & 19 Vict. c. 23, s. 1.

WIFE'S NEXT-
OF-KIN.

By our former law, when a wife predeceased her husband, rights emerged to her next-of-kin immediately upon her death; and, unquestionably, inconvenience and injustice often resulted. By the Moveable Succession Act of 1855, sect. 6, it is provided that, when a wife shall predecease her husband, her next-of-kin, or other representatives, shall have no right to any share of the goods in communion, nor shall any legacy by the wife affect the same. The old inconveniences are thus done away; but, where the goods in communion, wholly or largely, came by the wife, the new law is perhaps more unjust than the old. The position of the wife, as to property coming to her after her marriage, is materially improved by the more recent Act in the sections already quoted, particularly sect. 12, which gives the wife a claim over such property to the extent of a reasonable provision, preferable to the right of her husband or his creditors, or others claiming through him. It seems only just, however, that over such property the wife ought to have larger rights and powers. It appears unreasonable that a wife, who has brought her husband a portion or fortune, should, by law, have no further interest than the late Act gives her in what she must regard as her own, or at least as money over which she ought to have some disposing power. But, except as allowed by the late Act, unless she survives her husband, the circumstance of the moveable estate having come by her is of no consequence. She cannot grant even the most trifling legacy out of it; nor will her own children by a first marriage have any right in competition with the surviving husband of a second marriage.

On the subject of the extent of the operation of the *jus mariti* or *jus relicte*, it is important to observe that a fund, in order to fall within the communion of goods, must have been actually enjoyed, or capable of being enjoyed, as a vested interest during the marriage. Thus it was decided in the case of Wight,¹ that the contents of a policy of assurance on the life of a predeceasing wife, payable to the husband six months after her death, and the payment of which was dependent on the condition of his annually paying the premium of assurance, and on other conditions, does not fall under the communion; and, even under the old law, the wife's next-of-kin were not allowed to participate therein. A case precisely the same as that of Wight cannot happen under the law as altered by the Act of 1855, which excludes altogether the next-of-kin of a predeceasing wife. But the principle which ruled that case would apply in reference to a policy on the husband's life, payable after his death; in the contents of which a surviving wife and children would have no indefeasible interest, because it is not in communion during the marriage. The discussions in Wight's case on this subject are interesting and instructive.

What I have just stated shows the rights of the children in the moveable estate of both parents; and how far these rights are, or are not, defeasible at the will of the parents, or either of them. The heritable estate of both spouses is, by law, at the absolute disposal of the

¹ Wight, 27th Jan. 1849, 11 D. 459.

spouses respectively, but subject, more or less, to the rights of terce and courtesy, as already explained. So far as not disposed of by the parents, such heritable estate will fall exclusively to the eldest son, as heir of his father and mother (or as the case may be), subject to the rights of terce or courtesy; the son, if he takes his father's or mother's heritage, being excluded from any share of his father's dead's part, or his mother's moveables generally; but having right, in his option, to collate the heritage with the moveables, or dead's part, so that both may be shared equally among all the children,—the issue of deceased children taking their parent's share in the distribution. There is no obligation to collate the heritage coming from the mother, in order to authorize her heir to participate in the moveable estate of the father, nor *vice versa*.

HERITABLE
ESTATE.

The object of the marriage settlement is to exclude or modify the legal rights of the parties existing as now explained; and to substitute conventional rights or provisions in their stead. This is sometimes done wholly by the marriage-contract; sometimes partly by the contract, partly by a separate trust-disposition, bond of provision, or other deed; and these deeds may be antenuptial or postnuptial; though the legal effect of the postnuptial deed is, in several important respects, different from that of the antenuptial.

GENERAL
OBJECT OF
MARRIAGE
SETTLEMENT.

The terms of the marriage-contract, and of other matrimonial deeds, are in the greatest degree various; being largely dependent on the circumstances and wishes of the contracting parties; and it would not be profitable to go at length into the more unusual provisions of such deeds. I propose, therefore, to confine myself to those forms and clauses which are most commonly met with in practice.

I will begin with the antenuptial contract.

ANTENUPTIAL
CONTRACT.
ANNOUNCE
MENT.

We have first what is termed the announcement, which contains the description of the parties. Where they are of full age, and the estate to be affected is their own and at their free disposal, it is not necessary that any third parties be introduced, either as principals or as consenters, along with either of the proper contracting parties. But, where the lady's father is living, it is usual and proper to make him a consenting party along with his daughter, although he is to undertake no obligation, and his consent may have no legal significance. When her father is dead, her mother, if surviving, is usually made a consenting party in similar circumstances, in order to show that the marriage has her approval.

When either party is in minority, his or her legal guardians ought to be consenters, in order to obviate any question as to the validity of the provisions granted to the other spouse and the children; though questions as to such provisions are almost excluded by the mere fact of the deed being a marriage-contract on which marriage follows. In a case¹ where a minor having curators entered into a contract of marriage without their consent, the Court sustained a provision by him of the life-

¹ Davidson, 4th July 1632, M. 8988.

rent of his whole estate to his wife, if she should survive him, but reduced provisions made on his part in favour of his wife's father.¹ But, if obligations are to be undertaken by the father or others, for or with either party, the person undertaking such obligations ought to be made a party to the contract; unless it is arranged that he shall grant his obligations in a separate deed. The announcement ought, of course, to describe all the parties correctly and distinctly; and, where there are guardians, their particular character, and the deed under which they act, should be set forth, and the deed described by its date and other particulars, just as would be done in similar circumstances in the narrative or introductory clause of any ordinary deed.

The next clause is the obligation to solemnize the marriage agreeably to the rules of the Church.

SETTLEMENT
BY SPOUSES ON
EACH OTHER
AND THEIR
CHILDREN.

We then enter on the proper objects of the contract as a deed of settlement, which are—

1. On the husband's part, to make a suitable provision for his wife after his death, in case she shall survive him. Such provision is usually declared and accepted in lieu of the wife's legal claims on her husband's heritable estate, if any, and on that portion of the moveable estate which shall form the goods in communion.

2. To make a suitable provision for the children of the marriage, which is usually declared to be in lieu of their legal claims on the goods in communion.

And, 3. On the wife's part, to fix and settle the interests of her husband and herself and their children in the property, heritable or moveable, or both, belonging to her at the time of her marriage, or which shall fall to her during the subsistence of the marriage; and, it may be, to exclude the husband's legal claims on her property, in whole or in part.

The children have no indefeasible claims by law on their mother's estate, in reference to which, therefore, no exclusion is required as to them. They will, as already explained, succeed as her heirs or next-of-kin, if she shall not otherwise validly direct.

The husband's obligations are granted in contemplation of the marriage, and in consideration of the provisions granted on the wife's part. But the marriage itself is the true onerous cause of the deed; and the husband's provisions in favour of his wife and children (so far as they are not excessive) will be dealt with as onerous, and as granted upon a sufficient cause, although the marriage alone shall be the consideration of making them. They will be presumed to be granted in consideration of the marriage,—not of the provisions or tocher coming with the wife,—unless the contrary be shown by the contract.²

WIFE'S
JOINTURE.

The leading provision by the husband to his wife usually consists of an annuity or jointure, to take effect after his death, in the event of her

¹ See also on this subject Bruce, 23d Dec. 1854, 17 D. 265.

² Wightman, 30th July 1777, M. 9201.

surviving him, payable half-yearly or quarterly; the first payment being at the first of the half-yearly or quarterly terms occurring after his death; and, as the annuity is for maintenance, it ought to be payable in advance, each payment being for the term following. The bond of annuity, as exemplified in a former branch of the course,¹ will sufficiently show the appropriate terms of the personal obligation in all respects. When the wife, if she survives her husband, will have right to an annuity or allowance from any widows' fund to which the husband is a contributor, the marriage-contract ought to state whether such annuity or allowance is to be over and above or included in the annuity granted by the contract.

Under a simple personal obligation of the above description, the wife will be only a personal creditor upon her husband's estate, without any security for her provision. And in case of the husband's bankruptcy she will be ranked on his estate as an ordinary personal creditor; her claim, if he is alive, being only for the value estimated as for a contingent annuity. And, if any one is bound as cautioner for payment of the annuity, she is barred from suing him in case of her husband's bankruptcy, except for the value estimated as aforesaid, on payment of which value the cautioner is declared free.² If her husband be dead, the annuity will be no longer contingent, and she will be ranked on his estate as in the case of an ordinary annuity-creditor, but only for the value in one capital sum, not for an annual payment during her life.

If the husband is possessed of heritable estate held in fee-simple, he usually grants his wife security over it for her annuity; for which purpose a disposition in security, in the form given in the Style Book,³ may be adopted. The lands disposed in security should be of such free yearly value as fully to meet the amount of the annuity, supposing the husband to have lands of such value. If he has a large estate, the security should be confined to a portion thereof sufficient to meet the annuity easily and fully. The existence of an annuity which, though only for the wife's lifetime, is irredeemable whilst it lasts, as a burden on a large estate, may create trouble and inconvenience as regards feuing, selling, and granting other securities; and good security for her own protection is all that is required on the wife's part.

The security is sometimes granted in the form not of a disposition of the lands, but of an annuity to be uplifted out of the lands; the annuity to be so uplifted being equal in amount to that contained in the personal obligation. The difference in point of form between the two cases consists in this, that in the latter, in place of disposing the lands, the husband disposes All and Whole an annuity, or yearly sum of £ , to be uplifted as specified in the personal obligation furth of All and Whole (the lands), or furth of any part or portion thereof, or readiest rents and profits of the same. There will then follow assignation to rents and clause of warrandice, as in the other case.

¹ See *ante*, p. 259.

³ Juridical Styles, vol. i. p. 656.

² Bankrupt Act of 1856, 19 & 20 Vict. c. 79, ss. 53, 54, 55.

CONVEYANCE
IN SECURITY.

ANNUITY
UPLIFTABLE
FROM LANDS.

Substantially, the security given to the wife by either of these forms is the same; and, supposing the lands to yield a free rental sufficient to meet the annuity, it is of little consequence which form is adopted, though I prefer the conveyance of the lands, on account of its greater simplicity. But, if the lands do not yield a rent easily adequate to the discharge of the annuity, a power of sale ought to be given for enabling the wife, if necessary, to realize as much of the security lands by sale as will enable her to purchase an annuity from Government or a well-established assurance company. And, with a view to such sale, it is advisable that in this case there should be a disposition of the lands themselves, not merely of an annuity upliftable from them. The power of sale in such case may come into operation either in the discretion of the wife, if the necessity for a sale is obvious, or in case of failure to satisfy one or more terms' payments of the annuity within a certain period after they become due; and there will be an obligation to account for the price, after deduction of all arrears of the annuity, with interest thereon, penalty if incurred, and expenses, and also of such sum as shall be expended in the purchase, from Government or an assurance company, of an annuity equal to that secured; the sum payable to any assurance company never exceeding the Government price.

**ABERDEEN ACT
ANNUITY.**

If, again, the husband is proprietor of an entailed estate, he can, in virtue of the Act 5 Geo. IV. cap. 87, commonly known as the Aberdeen Act, grant his wife an annuity out of the estate, not exceeding one third part of the free yearly rent thereof, so far as let, and the free yearly value, so far as unlet, as the same shall be at the death of the granter.¹ The powers of this Act are conferred on the heirs of entail in possession; a term which we shall find does not include the institute, in questions as to the parties who are bound by the fetters of an entail. But, with reference to this Act, the term 'heirs' is held to include the institute, and to give him the power of granting the authorized provisions.²

The bond, which can easily be incorporated with the contract of marriage, refers shortly to the powers conferred by the Act, but it contains no personal obligation on the husband, or his heirs of entail, for payment. The Act does not authorize such obligation,—only to provide and infest the wife in the annuity. By the bond, therefore, the husband provides and disposes to his wife the stipulated annuity, upliftable furth of the entailed lands, at the terms and by the proportions specified, and with penalty and interest in usual form; declaring that the same is granted under all the conditions and limitations contained in the Act, as far as these are applicable. The principal condition here referred to is that, although the provision granted shall exceed the proportion of the rental or value of the estate allowed by the Act to be granted, the bond shall not be void, but shall only be voidable to the extent of the excess over what the Act allows, and no further.

¹ A form of the bond of annuity applicable to this case will be found in the *Juridical Styles*, i. 664.

² *Hamilton*, 11th March 1857, 19 D. 723.

After this reference to the Act, there arose, in deeds framed before the Titles Act of 1858, a material distinction between the form of deed now under consideration, and that by which an annuity out of a fee-simple estate was disposed in security of a personal bond of annuity. The latter is a case of bond and disposition in security, clearly falling within the scope of the Heritable Securities Act of 1854. It could therefore be framed in the short form of bond and disposition in security authorized by the Heritable Securities Act of 1847. But, in the case of the annuity furth of the entailed estate, there is no proper security, and no bond and disposition in security;—what is granted is the right to uplift an annuity out of the entailed estate; it is neither a bond nor a security; and, therefore, the provisions of the Heritable Securities Acts of 1847 and 1854 do not appear to apply to it. The necessity for infestment, therefore, in order to complete the right, remained the same as before these Acts were passed, until the Titles Act of 1858 came into operation; and in deeds conferring annuities under the Aberdeen Act, granted previously to the operation of the Titles Act, there followed, after the clauses we have just referred to, an obligation by the husband to infest the wife in the annuity to be uplifted furth of the lands, with a clause of *tenendas*, whereby the annuity was declared to be holden, in the case of feudal subjects, of and under the husband and his heirs, in free blench-farm, for the yearly *reddendo* of one penny Scots; and to be holden, in the case of burgage-subjects, of Her Majesty in free burgage. The obligation to infest in feudal subjects was followed by assignation to rents and writs, and clause of warrandice, registration clause in the old form, and precept of sasine for infesting in the annuity; a form of which is given in the Style Book.¹ The obligation to infest in burgage-subjects was followed by procuratory of resignation in ordinary form, applicable to the annuity, with assignation to rents and writs, and warrandice and registration clauses.

The bond of annuity in the above form required an instrument of sasine in order to complete the wife's right; an example of which, as affecting proper feudal subjects, will be found in the Style Book.² Now, by the Titles Act of 1858, in the case of feudal subjects, neither obligation to infest nor precept of sasine is required; and by the Titles Act of 1860, as to burgage-subjects, neither obligation to infest nor procuratory of resignation is required; nor is there any occasion for an instrument of sasine as to either feudal or burgage-subjects. The registration of the bond in the appropriate register of sasines, with warrant of registration thereon, is equivalent to an instrument of sasine expedite thereon and recorded.

I formerly noticed that the clause of direction allowed by the Titles Acts of 1858, sect. 3, and 1860, sect. 5, was very suitable to marriage contracts. In such deeds as we have now before us, the parts requiring to be recorded, in order to complete the wife's security, are the obligation for

¹ Juridical Styles, i. 667.

² Juridical Styles, i. 724.

payment, if any, the disposition in security, and the *tenendas*, if any; and these, with any relative qualifications, can be thrown together at or near the commencement of the contract. The clause of direction will then direct the deed, from the commencement to the end of the clauses above referred to, to be recorded along with the clause of direction itself and testing-clause; and the benefit of the Act will be secured without incurring the expense of registering the whole deed, or resorting to a notarial instrument. You will recollect, however, that the clause of direction, in order to be effectual and operative, requires to be referred to in the warrant of registration.

WIDOWS' FUND
ANNUITY.

Although an annuity from a widows' fund is to form part of the wife's provision, the obligation by the husband, and relative security, should be granted for the full amount of the provision, without deducting the amount of the widows' fund annuity, subject to a declaration that whatever sum shall be received from the widows' fund shall be taken as so much to account of the provision. In that way the wife's security covers the sum payable from the widows' fund; and at the same time the husband's estate does not suffer if the widows' fund annuity is duly kept up and paid.

INCOME-TAX.

Provisions to wives are often declared specially to be exempt from the payment of Income-tax. But such a stipulation or covenant will not receive effect; being declared unlawful by the Income-tax Acts.¹ In deciding the case of Blair, Lord Cowan said the question was not touched whether a man might not legally bind himself, his trustees, or representatives, to repay to an annuitant or creditor what might be deducted for Income-tax. His Lordship does not say that such an obligation will be effectual, but obviously suggests that some such stipulation may be worthy of trial.

RENTAL OF
ESTATE LET.

With reference to the Aberdeen Act, in estimating the rental of the estate let, the rents received for shootings actually let are to be taken into account;² also the rent of coal let.³ And in estimating the yearly value of the estate not let, the value of shootings, both on Highland and Lowland estates, though never previously let, must be taken into account;⁴ likewise the value of salmon-fishings.⁵ But the value of the mansion-house, gardens, and policies is not to be taken into account.⁶ The free yearly rent, or free yearly value of the estate is to be taken, after deducting all the annual burdens diminishing the clear yearly rent or value to the heir in possession, as the same shall happen to be at the death of the granter of the annuity; but the Income-tax is a personal

¹ 5 & 6 Vict. c. 35, s. 103; 16 & 17 Vict. c. 34, s. 5; 18 & 19 Vict. c. 20, s. 3. See Blair, 16th Nov. 1858, 21 D. 15.

² Macpherson, 24th May 1839, 1 D. 794; same parties, 16th Feb. 1843, 5 D. 651; affirmed 13th Aug. 1846, 5 Bell's App. 280; Sinclair, 24th Nov. 1842, 5 D. 174.

³ Wellwood, 12th July, 1848, 10 D. 1480.

⁴ Leith, 10th June 1862, 24 D. 1059.

⁵ Same case.

⁶ Same case, and Macpherson's above quoted, 24th May 1839, 1 D. 794.

tax,—not a burden on the lands, though assessed with reference to the rental,—and is not to be deducted.¹

The provision from an entailed estate is not unfrequently granted under special power contained in the deed of entail, and not in virtue of the Aberdeen Act. If such power is to be exercised, the precise mode and form of granting the provision authorized by the entail must be adopted. Generally speaking, the deed will be so similar to that granted in virtue of the Aberdeen Act, or to an ordinary bond of annuity and disposition in security, that no separate remarks are here called for. When framed on the principle of the Aberdeen bond, it formerly required to be followed by instrument of sasine : registration now comes in the place of sasine. In order that the provision may be effectual, however, the power must be exercised.² In Campbell's case, it was pleaded that, the terce being excluded by the entail which gave power to grant the provision in lieu of terce, the provision should arise simply as a *surrogatum* for the terce ; but this view was not adopted. The amount, or proportion of the rental, for which the bond of annuity may be granted, is usually specified in the deed of entail ; and it cannot be exceeded. But where the entail allows 'reasonable provisions' to be granted, without further definition of the amount, the Court may exercise an equitable control as to the amount.³ The Act is not to abridge more extensive powers contained in deeds of entail. But, on the other hand, the same heir is not to exercise the powers of the Act in addition to those of the entail, so as, in virtue of both together, to grant a total provision exceeding what is allowed by the Act ; but notwithstanding the subsistence of a provision in favour of the widow of a former heir, granted by virtue of powers in the deed of entail, the heir in possession may exercise the powers conferred by the Act by granting a provision to his wife.⁴ An heir, however, cannot grant provisions under the Act, except so far as the powers of the Act are unexhausted for the time.⁵

The sections of the Aberdeen Act above referred to relate equally to the power of granting provisions to children in virtue of the Act ; and Lockhart's case related to provisions in favour of children. Their import, therefore, must be kept in view in connexion with the framing of bonds of provision under the Act ; and where reliance is to be placed on such bonds it will be necessary to ascertain whether there are any, and if so what, provisions already subsisting, granted under the Act in favour of wives or children.

The only other form for securing liferent provisions to a wife out of lands which seems to require notice is that of locality,—that is, the husband's allocating or setting apart to his wife in liferent certain portions of his estate, to be possessed by her during her life after his death.

¹ Maclaine, 20th November 1845, 8 D. 150. affirmed 28th Sept. 1831, 5 Wil. & Sh. 611.

² Campbell, 16th Dec. 1818, F. C.

⁴ Aberdeen Act, s. 12 ; Lockhart, 15th July 1853, 15 D. 914.

³ Earl of Mar, 3d Dec. 1830, 9 Sh. 126 ;

⁵ Aberdeen Act, s. 6.

PROVISION BY
WAY OF
LOCALITY.

By the deed or clause of locality, the husband disposes these lands to his wife in *liferent*. Until the Titles Acts came into operation, he further granted obligation to *infest*, with precept of *sasine* as to feudal, and procuratory of resignation as to *burgage*, subjects, for *infesting* her therein, to be holden of himself or of the Crown, as the case might be; as was at the same time the rule in the case of the bond of annuity under the Aberdeen Act. Now, the deed of locality will not contain any of these further clauses; nor does it require to be followed by *sasine*. It can be registered in the appropriate register of *sasines*; and, if contained in a marriage-contract, a notarial instrument can be expedite and recorded on the contract; or there may be a clause of direction in the contract, with equal benefit as in the case of an ordinary annuity and security. In the locality right, there are assignments to writs and rents, and clauses of *warrandice* and registration for preservation. By a provision in this form, the wife, upon her husband's death, becomes proprietor for her life of the locality lands, with all the rights and powers, and subject to all the liabilities, of an ordinary *liferent*-proprietor, except so far as these may be specially increased or qualified by the deed of locality. But, though it is perfectly competent to grant localities in the case of unentailed estates, the practice of doing so in such cases was long ago given up, and the fixed annuity substituted; because the locality right had been found inconvenient for the wife, as giving her a fluctuating and, it might be, precarious income, with the charge of managing her lands. It was likewise injurious to the estate, by separating the management of the locality lands from that of the remainder; besides that the wife could not, unless specially empowered, grant leases to endure beyond her own lifetime. The granting of the fixed annuity, with security over a sufficient portion of the estate, makes due provision for the wife's income or jointure, and at the same time obviates all the inconveniences of the locality right.

The granting of locality-rights continued, in reference to many entailed estates, long after it was given up in the case of unentailed estates; because the makers of entails frequently excluded the right of their heirs to grant provisions to their wives by way of annuity, and allowed them to grant localities only. The inconvenience of the localities, however, was felt equally in the case of the entailed as of the unentailed estate; and in connexion with entailed estates it was not uncommon, in granting localities, to stipulate that the wife should not be entitled to enter to possession of her locality lands so long as she should be paid a certain fixed annuity; the amount of which, of course, was not more than the free rental of the locality lands. The same result was attained by stipulating that the wife should grant the heir a lease of the locality lands at a specified rent, under a provision that, if the rent should not be regularly paid, she should be entitled to terminate the lease, and enter to the lands.

In either of these ways, the practical evil was got over. But, since

the passing of the Aberdeen Act, locality rights are rarely met with, even in the case of entailed estates. They can, however, when allowed, be still resorted to in cases where the power of granting localities enables the heir of entail in possession to give a better provision than he could do by an Aberdeen Act annuity, and where it is desired to make the largest provision possible. The rental, according to which the extent of the locality lands is to be fixed, is usually that for the time when the locality is granted; not as at the time of the death of the granter, as in the case of annuities under the Aberdeen Act. The wife is thus interested in the intermediate rise or fall of the rents.¹ When the extent of the power to provide by way of locality is in proportion to the total rental of the estate at the time of granting the provision, such rental, and also that of the locality lands, should be authenticated as relative to any provision by way of locality out of an entailed estate. This will be best done by schedules annexed to the deed of locality, and signed as relative to it.

The locality right, not being a security, required to be completed by instrument of sasine in the form applicable to liferent rights, until after the Titles Act came into operation. Now it can be completed by registration; and in many cases it will be advisable to take advantage of the clause of direction.

In the cases we have been considering, the husband is able at once to give his wife heritable security for her jointure. Where security is stipulated for, and the husband has no land over which to grant it, it is sometimes agreed that he shall, at the sight of certain persons named, lay out a sum of money, and take the rights to his wife in liferent after his death, in case of her surviving him, and to himself in fee. In this case, the wife will have heritable security after the husband's obligation is fulfilled,—until then only his personal obligation. Full security can, however, be given her, by placing the stipulated sum in the hands of trustees until invested. Another mode of proceeding, which is sometimes found convenient, is to purchase an annuity from Government, or a well-established assurance company, payable to the wife during her life after her husband's death, in case she shall survive him. If the purchase is made before the marriage, it will be recited in the marriage-contract. If not so made, the contract will contain an obligation to make the purchase; and, for security, the amount of the purchase-money can here also, if required, be set apart in the hands of certain persons, at whose sight the purchase is to be made. And probably the most common of all the modes in which security is given, when there is no land estate, is to place a fund in the hands of trustees, and charge the same with the payment of the annuity to the wife. It is to be remarked, however, that in all these cases, including those in which security over lands is given, the wife, if not effectually prohibited, can, with her

¹ Agnew, 12th Dec. 1810, F. C., reported under date 24th Jan. 1811; Malcolm, 21st Nov. 1823, 2 Sh. 514.

husband's concurrence, defeat her own security, and reduce herself to the position of a mere personal creditor of her husband, by being a party, as principal or consentor, to deeds whereby the subject of the security is for onerous causes burdened or alienated in favour of third parties; or, in the case of the entail annuity or locality, the provision itself charged with debt contracted by her husband, or otherwise disposed of with his consent by onerous contracts with third parties. For preventing such a result, the most effective arrangement would be to grant the provision (whatever may be its character) to trustees for the wife, and prohibit her from assigning or burdening, or affecting her interest in it, without the consent of the trustees; or, when the provision is granted to the wife herself, to prohibit her as above, except with consent of certain individuals named; in either case declaring all acts done by her, in contravention of the prohibition, to be null. In some cases, an absolute prohibition, and declaration of the nullity of acts of contravention, may be thought still better. But, in general, it will be more advantageous to qualify the prohibition so as to enable the wife, with consent of the trustees, to make her right, or a portion of it, available to the husband. Because no one can foresee what shall, at some future period, be most for the interests of parties about to marry, and their children; and, though it may occasionally place the trustees (or parties whose consent is required) in a position of embarrassment and difficulty,—when, for example, they have to refuse their consent to a proposal which they view differently from the husband and wife,—still the great object must always be, that the available resources of the parties shall not be locked up to their positive disadvantage; and the prohibition, with a qualification such as I now speak of, appears most likely to meet the end of giving the wife real and substantial security, and, at the same time, of turning the subject of the security to account for behoof of the parties, if and as far as that can be done consistently with that primary purpose.

The Style Book¹ contains provisions to the wife in *liferent*, in case of her survivance, of one-half of the estate, heritable and moveable, which the husband shall acquire during the marriage by conquest, succession, or otherwise; and that in addition to the jointure provided to her at the time of the marriage. The jointure, it may be supposed, corresponds to what the husband's means will afford at the time it is granted. This additional provision is intended to give the wife a fair interest in any improvement in his circumstances; and, by introducing the obligation in the antenuptial contract, the additional provision will be made onerous and irrevocable on the part of the husband,—not of the nature of a donation to his wife, which would be revocable by him at his pleasure.

In contracts with such a provision, the amount or value of the husband's estate as at the time of the marriage should be specified, so

¹ Juridical Style, 3d edit. ii. 202.

that data may readily be afforded for ascertaining what is acquired by conquest, or otherwise, afterwards.

In such cases, also, care should be taken explicitly to define the CONQUEST.
nature of the estate of which the wife is provided to a partial life-rent. Lord Stair says,¹ 'Clauses of conquest are interpreted strictly, 'according to the tenor thereof; for sometimes they only bear lands 'conquest, sometimes lands or annualrents, sometimes lands, annual-rents, or sums of money; and sometimes goods or gear.' The simple term 'conquest' includes only, in heritage, what a party acquires by industry, economy, purchase, or donation; or what is technically called 'singular title,' that is, what is acquired by a separate title, in opposition to what comes by succession in virtue of an ancestor's title, or of the Common Law; and in moveables the term 'conquest' does not include what is acquired by succession as next-of-kin to a person deceased, or by legacy, or by the *jus mariti*.² And an obligation on the husband, to infest his wife in all lands and annualrents which he should conquest during the marriage, does not give the wife the benefit of leases, which are not subjects for infestment.³ Neither does the conquest of lands, annualrents, goods, and gear include bonds bearing date after the marriage,—bonds not being specially mentioned; unless the wife shall prove that they were granted for sums or moveables acquired during the marriage.⁴ But when the term 'conquest' applies to all lands and heritages, and has no qualifying word attached, it will include leases acquired during the marriage, and current at the dissolution.⁵ Leases, however, of which the term of entry has not arrived at the time of the dissolution, are not included in a clause of heritages conquest during the marriage.⁶

If an estate is sold, and another estate is bought, during the subsistence of the marriage, the price of the estate sold is to be deducted from the value of the estate purchased, in estimating the amount of the conquest.⁷ But antenuptial provisions in favour of the wife are to be deducted from the estate which belonged to the husband at the time of the marriage, not from the subsequent acquisitions or conquest.⁸

The husband's powers over the conquest should also be defined, if they are to be in any way qualified; because the conquest, even though wholly provided to the wife in life-rent, remains by law the property and under the power of the husband, except in so far as his power may be expressly qualified or given up. If his power is left unqualified, he may not only sell or burden the conquest at his pleasure for onerous causes, but may grant out of it competent provisions to the children, and even to the eldest son of the marriage, if enough remains as a provision

¹ Stair, iii. 5. 52.

² Erskine, iii. 8. 43; Rae, 23d Jan. 1810, F. C.

³ Dunfermling, 12th March 1628, M. 3048.

⁴ Robson, 16th July 1673, M. 3050.

⁵ Duncan, 15th Feb. 1810, F. C.

⁶ Same case.

⁷ Erskine, *ut supra*.

⁸ Hunter's Trustees, 25th May 1839, 1 D. 817.

to the wife.¹ And, although the conquest be provided to the wife in liferent, and, failing children of the marriage, to her relations in fee, the husband remains the *fiar*, and his wife's relations are only heirs, whom he can disappoint, not only for onerous causes, but at his pleasure. In particular, he can grant provisions out of the conquest for his wife and children of a second marriage.²

But when reasonable provisions are granted, as at the time of the marriage, it may be worthy of consideration whether the provision of an interest in the conquest during the marriage is advisable. It is well to make a suitable provision at the time of the marriage, with reference to the circumstances then existing. If there is a known contingency, such as the expected succession to an entailed estate, in which event the husband will be able, and ought, to make better provisions, a relative definite obligation can be introduced to meet that case, should it happen. But, as to anything further, I apprehend it is a sound general principle to leave the husband to do as he shall think best and right.

It is sometimes arranged to restrict the widow's annuity, or other provisions, in the event of her entering into a second marriage, for which purpose a special stipulation must be made in the contract.

Care should be taken to see that the husband who grants provisions to his wife, especially if he has succeeded to the estate as heir of a predecessor, is registered or infeft in the estate, whether entailed or unentailed. But even if the husband has right as an heir, and dies without having his title made up, so that he is never feudally connected with the estate, yet, if the provision is onerous or rational, and if the husband has been three years in possession, the next heir (who in making up titles will pass him by, just as if he had never existed) is liable, under the Act 1695, cap. 24, to make good the provision to the wife of the party so passed by, so far (in the case of an heir of entail) as allowed by law or by the entail.³ It should also be seen that the lands are not encumbered with debt, so as to defeat or impair the provision.

FURNITURE.

Besides the jointure, or other annual provision to the wife for maintenance after her husband's death, the contract usually gives her, if she survives, a right of liferent or of fee in her husband's household furniture and effects; or it contains an obligation to pay her a specific sum to supply herself with furniture. It likewise contains a provision for mournings, and for aliment from the time of her husband's death till the annuity becomes payable. The object of these provisions is to enable the wife to enjoy her annuity free of the burden which the purchase of furniture and mournings and the interim aliment would occasion,—to enable her, in short, to enter on her house or establishment free of debt. And if the wife's right is to include silver-plate, bed and table-linen, books, pictures, and household goods generally, these should be specified;

¹ Robson's case.

Anderson, 28th July and 1st Dec. 1680, M. 12,890.

³ Glencairn, 23d May 1800, M. App. Heir-Apparent, No. 1; Kennedy, 11th Feb. 1829, 7 Sh. 397.

because, if they are not, the term 'furniture,' though in a marriage-contract it will be liberally construed, will not include them. WIFE'S PROVISIONS.

It is not uncommon to annex to the provision in favour of the wife of the liferent or fee of her husband's household furniture and effects, a power to the wife, in her option, to ask, or to the husband's representatives, in their option, to pay, a capital sum in lieu of that provision. In either case, the option should be made to expire if not declared in writing, and the compensation money actually paid within a short specified period. When the actual furniture is provided, either in liferent or fee, the provision thereof is open to this objection, that, being of what shall belong to the husband at his death, his wife will have no claim on his estate on that account, if he shall be divested before his death. Where such provision was made, and the husband was sequestered, and shortly afterwards died, the widow was found not entitled even to be ranked on his estate after his death for the value of the furniture.¹

There is no way of securing to the wife either the liferent or fee of her husband's furniture of which he remains in possession. Whilst his possession continues, the settlement upon his wife would not operate transference from him in any question with his creditors; and the furniture would be liable to the diligence of such creditors.² The alternative provision of a specific sum in lieu of the furniture would, however, enable the wife to claim as a creditor for the amount of such sum.

A specific sum is frequently named as the allowance for mournings, MOURNINGS. to which there seems no objection. The amount of interim aliment is also occasionally named; but it is better to make that provision in general terms, because it may be required for a longer or shorter period, according to the time of the year at which the husband shall happen to die; and it ought to have some reference to the state of his affairs, or establishment, as at the time of his death, which may not be the same as at the time of the marriage. On the subject of the wife's claim under an obligation generally for aliment, the Lord Justice-Clerk Inglis delivered the opinion of the Court upon a case transmitted for opinion by the Court of Chancery in England, in pursuance of the Act 22 & 23 Vict. cap. 63.³ His Lordship says, 'The amount of alimony to which the widow will be entitled is not to be measured by the extent of her provisions, legal or conventional, but rather by the husband's quality and fortune, and the nature of the establishment he had at his death, which it is reasonable she should be entitled to keep up till the first term of Whitsunday or Martinmas—Erskine, i. 6. 41. But the *quantum* of the alimony will be diminished, if the husband's establishment is not maintained, but broken up immediately on his death—Palmer, 27th June 1811, F. C.'

The Style Book⁴ contains a clause of warrandice of the conveyance

¹ Darling, 20th Dec. 1851, 14 D. 296.

³ Baroness de Blonay and others, 17th

² Campbell, 13th June 1843, 10 D. July 1863, 1 Macph. 1147.

⁴ Juridical Styles, ii. 203.

of furniture; but such clause will not obviate the difficulty arising from the risk of the husband being divested.

When, as part of the marriage-settlement generally, a fund is placed in the hands of trustees, any sums of money provided in lieu of furniture, or for mournings, or aliment, may be directed to be paid out of the trust-fund; which will be a simple way of giving security for these sums, if such is desired. The form in the Style Book likewise provides a sum to the wife as the expense of maintaining the family, and for house-rent and servants' wages, from the time of her husband's death till her annuity becomes payable. But obligations to the above effect are incumbent on the husband without express stipulation; and, as it would appear that they may be covered by the general obligation for aliment to the wife during the above period, it may often be advisable to omit from the contract such stipulations as those now referred to.

DISCHARGE OF
WIFE'S LEGAL
PROVISIONS.

When the annuity and other provisions to the wife are intended to supersede, and come in place of, her legal provisions of terce and *jus relictæ*, as is generally the case, the contract ought to contain an express acceptance by the wife, with consent of her father or guardians, as the case may be, of the conventional provisions as in lieu and place of the legal provisions, and a discharge of the legal provisions. Although such discharge is recommended, however, in order to keep clear of all questions as to the intention of the parties on this important point, it is to be observed that where a particular provision is granted by a husband to his wife, either in a contract of marriage or some other writ, before or after the marriage, the wife is thereby excluded from a terce, unless the contrary be provided.¹ This rule holds although the special provision is contained in a contract of marriage drawn up in foreign form. And where the wife, in such contract, renounced every right she might have over her husband's funds, it was found that she could not claim the terce, but was restricted to the special provision.² The same rule holds with reference to the wife's claim of *jus relictæ*.³ But, when it appears that the husband's intention was to make the special provision over and above the terce, the widow will get both.⁴ And where by antenuptial contract, in the English form, between an English woman and a Scotchman both resident in England, the husband provided an annuity to his wife 'in lieu and full bar and satisfaction of the dower,' or thirds, which at the Common Law, or by custom, she can or otherwise might claim from her husband's estate, and also in full bar and satisfaction of the terce to which she was or otherwise might be entitled by the law of Scotland,—it was held that she was not barred from her claim of *jus relictæ*.⁵

The wife may exclude her legal claims by homologating a deed

¹ 1681, c. 10.

² Countess of Findlater, 8th Feb. 1814, F. C.

³ Erskine, iii. 3. 30; Mackinnon, 24th Feb. 1713, M. 2278; and Riddel, 28th Nov. 1781, M. 6457.

⁴ Ross, 20th Jan. 1797, M. 4631; reversed 15th Dec. 1797, M. App. Foreign, No. 5.

⁵ Keith's Trustees, 17th July 1857, 19 D. 1040.

clearly inconsistent therewith. But acts of alleged homologation will be of no avail against her, if done in ignorance either of her legal rights, or of the state of her husband's affairs.¹ It has been questioned how far a discharge of the legal provisions was implied by acceptance even of the liferent of the husband's whole estate, granted by a testamentary deed to which the wife was not a party.² But in the case of Keith's Trustees, already cited, it was held that the widow, claiming her *jus relictæ*, was bound to elect between that and testamentary provisions created under a universal settlement executed by her husband; and, in the event of her electing to take the *jus relictæ*, that she must repeat and pay back the amount of the testamentary provisions paid to her in terms of that settlement. If, however, the deed giving the wife, if she survives, the liferent of her husband's whole estate, is testamentary and revocable by the husband himself alone, the discharge of the wife's legal rights does not necessarily follow from the mere execution of such deed, even if she is a party to it.³ In Leighton's case, a husband made a testamentary deed, to which his wife was a consentor, and by which he settled on her, in case she should survive him, the liferent of his whole estate, and gave directions for the disposal of the whole estate upon his death. The deed reserved power of revocation to the husband by himself alone. It contained no acceptance by the wife of the testamentary, as in lieu of her legal, provisions, but in its terms did not appear to contemplate the case, which happened, of her predecease. After her death the husband revoked, and, it was thought, destroyed the deed; and, in a question with his wife's next-of-kin, it was found that the deed did not operate the exclusion of her legal provisions in the event of her predecease. The Lord Justice-General Boyle says, 'We are asked 'to hold that the wife has, by implication, given away rights to which 'her attention was never called. I am not for going that length.' Such a case as Leighton's cannot occur as the law now stands; because, by the Moveable Succession Act of 1855,⁴ the representatives of a predeceasing wife have no right to any share of the goods in communion. But the wife may survive, and, in that case, claim her *jus relictæ*; and though the authorities quoted show that her claim may, in certain circumstances, be excluded by inference or implication, they certainly do not encourage any departure from the usual practice of introducing, in the marriage-contract, the express discharge of the legal provisions. Such discharge ought invariably to be inserted, so as to exclude all risk of both the legal and conventional provisions being claimed, unless the contrary be desired; in which case, again, the contract ought to express that the conventional provisions are not to supersede the legal claims, so that objections to the wife's claim to both may be excluded. In short, the marriage-contract ought to tell, expressly and distinctly, what the parties intend on this important point.

¹ Hope, 17th Dec. 1833, 12 Sh. 222; Ross, 3d Feb. 1843, 5 D. 483; Keith's Trustees, *supra*.

² Thomson, 8th Dec. 1849, 12 D. 276.

³ Leighton, 1st Dec. 1842, 15-D. 126.

⁴ 18 & 19 Vict. c. 23.

It was further decided, in the case of Keith's Trustees, that, if the widow should elect to take her *jus relictæ*, the amount thereof was not to be diminished by imputing thereto any sums provided to her in the marriage-contract; but that these sums, being debts due by the husband (and in that case on personal obligation without heritable security), were to be deducted from the entire moveable estate, as at the time of her husband's death.

PROVISIONS TO
CHILDREN OF
THE MARRIAGE.
WHEN HUSBAND
HAS LAND
ESTATE.
ENTAILED
ESTATE.

The next branch of the contract is that by which provision is made for the children of the marriage.

And here I notice, first, cases in which the husband has a land estate.

When the estate is effectually entailed, it is usual to hold the entail as making provision for the eldest son or heir, and to make no special settlement in his favour by the marriage-contract; though the marriage-contract sometimes repeats the entail; and, if there is any doubt as to the validity of the entail, there ought to be some provision for the eldest son or heir of the marriage,—for example, it may be stipulated that, without prejudice to any right the father may have of dealing with the estate as fee-simple and free from the fetters of the entail, he shall not disappoint the right of succession thereby established, so far as regards the heirs of the marriage; or the provisions intended for the younger children may be so expressed as to authorize a share or interest therein being bestowed on the heir,—otherwise it may happen that he will be left without any provision at all, if the entail is found ineffectual, and the estate sold.

When the descent of an entailed estate, held under an old entail (that is an entail dated prior to 1st August 1848), is secured by the marriage-contract of the heir in possession, or the heir-apparent, to the issue of the marriage,—such heir or heir-apparent cannot disentail or consent to the disentail of the estate, under the Entail Amendment or Rutherford Act,¹ until there shall be born a child of the marriage capable of taking the estate in terms of the contract, and who, by himself or his guardian, shall consent to the disentail; or until the marriage shall be dissolved without such child being born; unless the trustees named in the contract, or the parties at whose sight the provisions of the contract are to be carried into execution, shall concur in the application or consent to disentail. This provision shows the importance of making a special settlement in favour of the heirs of the marriage even when the estate is entailed, and the entail understood to be valid and effectual.

FEE-SIMPLE
ESTATE.

We now proceed to the case of the settlement of a fee-simple estate by marriage-contract in favour of the heirs of the marriage.

We shall, in the first place, assume that it is intended to provide the fee-simple lands to the heir of the marriage,—a case not unfrequent when there is a considerable family estate. And here we must keep in view that we are dealing with a feudal estate. We shall indeed see that, as

¹ 11 & 12 Vict. c. 36, s. 8.

to marriage-contracts, more than any other deeds, the rules of the feudal system will be strained by Courts of Law so as to give effect to the intention of parties. But, in considering the terms in which the regular and formal settlement of a land-estate ought to be expressed in a marriage-contract, we are to keep in mind that the clauses ought to be framed in strict accordance with the same feudal rules which regulate ordinary conveyances of land-rights; and that the husband, when he is the feudal proprietor, ought to act and be dealt with (as far as formalities of disposition or obligation are concerned) in like manner as if he were about to contract with a purchaser or lender on the security of his estate.

In consistency with these views, the first clause we meet with in the settlement of the land-estate is the dispositive, by which the husband, as heritable proprietor of the lands, in contemplation of the intended marriage, and in consideration of the provisions made by his wife in the contract, disposes his estate in the terms agreed on. When, as is the most usual case, the settlement is to take effect on the husband's death, the disposition will be to the husband himself, and to the sons of the marriage in their order of seniority, and the heirs whomsoever of their bodies respectively; whom failing, to the sons to be born to the husband in any subsequent marriage, in their order of seniority, and the heirs whomsoever of their bodies respectively; whom failing, to the daughters of the intended and of any subsequent marriage, in their order of seniority, and the heirs whomsoever of their bodies respectively; whom failing, to the husband's own heirs or assignees whomsoever; and it is usual to add that the eldest daughter or heir-female is always to succeed without division, and exclude heirs-portioners. The destination here given adheres to the legal order of succession more nearly than that proposed in the *Style-Book*,¹ where the settlement calls the heirs-male of the intended marriage; whom failing, the heirs-male of any subsequent marriage; whom failing, the heirs-female of the intended and subsequent marriages. This of course is a matter in which it is the business of the Conveyancer to give effect to the wishes of the parties; but it seems to be more natural, and it is probably also more usual, to provide the estate, in case of the failure of the eldest son without male issue, to that son's daughter, as by the style here given, than to his brother, as by the *Style-Book* form.

After calling the sons and daughters and their descendants, the destination may call other heirs, if the husband thinks fit; but it is not usual in antenuptial contracts to name special heirs beyond the immediate descendants of the husband.

The destination being to the sons, and then to daughters in their order of seniority, each daughter to whom the succession shall open will take the whole estate in like manner as if she had been a son. Thus far there is no need, and no room, for the seclusion of heirs-portioners.

¹ Juridical Styles, i. 176.

The clause of seclusion introduced at the close of the destination is intended to operate to this effect, that if the eldest son, or any of the other heirs, shall die leaving two or more daughters and no son, the eldest of such daughters shall take the estate, on the failure of the prior heirs, to the exclusion of her sisters, in the same way as if she had been a son.

We have next the description or specification of the lands disposed, which ought to be framed according to the rules already explained with reference to the case of an ordinary disposition. The marriage-contract, in fact, embodies a disposition of the estate; and, if properly framed, will become one of the titles equally as if it had been an ordinary disposition. The description will be followed by the usual clause giving all right, title, and interest which the husband has in the lands, and then (no *tenendas* clause being here required) by the assignation of rents and writs, and clause of warrandice. When the lands are held by feudal tenure, there ought to be a procuratory or clause of resignation.

In reference to the right of the wife to her annuity under the powers of the Aberdeen Act, or of the entail, or to her locality lands, I suggested that there should be a holding *de me*, that is, of and under the husband only. In that case, a merely temporary right is all that is to be constituted; and as the conveyance to be holden of the husband gives a complete title in itself, and equal security with the alternative holding *a me vel de me*, it is usual to frame the annuity or locality right in the first of these forms, though it is equally competent in that case to employ the alternative holding. But the settlement of the land-estate is in a different situation. The object here is not to create a liferent or temporary right, but to transfer to the heirs called by the marriage-contract the fee or estate which exists in the person of the husband. That could not be done by conveyance to be holden only of the husband. Such conveyance would create a new fee or subaltern right; leaving the former fee (as a mid-superiority) in the person of the husband, in virtue of the prior investiture, and descendible to the heirs of that investiture, who might not be the heirs of the marriage. In order to transfer the then existing fee, as it stands in the husband's person, to the heirs of the marriage, the same forms must be made use of as if a transfer to a purchaser were intended. The conveyance must, therefore, be either expressly, or (as seems preferable) by leaving out all specification of the manner of holding, to be holden *a me vel de me*. It would confuse and complicate the future titles of the estate, without benefit to any one, if the holding, as regards the settlement of the land-estate on the heirs of the marriage, were *de me* only.

There is no clause or procuratory of resignation with reference to the annuity or locality lands, because the conveyance in that case does not contemplate or allow of resignation in the hands of the granter's superior. The granter is himself to be the superior of the *de me* annuity or locality right. But, where feudal subjects are conveyed, the clause or procuratory naturally follows the conveyance of the land estate to be holden *a me*

vel de me; and there is nothing peculiar in it, or in the assignation to rents and writs, or clause of warrandice, which will be absolute. There should not (as in the case of the sale of lands) be any exception of feu-rights or current leases; because what is conveyed is the estate, just as the husband has it; and the heir of the marriage is legally bound, in the character of heir, to support such feu-rights and leases. When the lands are held burgage, there will be no express manner of holding, and no procuratory of resignation.

CHILDREN'S
PROVISIONS.

I shall notice the registration clause,—and also, with reference to contracts executed before the Titles Act of 1858 came into operation, the precept of sasine,—after considering the clauses and provisions which usually follow the clauses now enumerated, and come before the registration clause and precept.

But it is proper here to explain the legal operation of a settlement in the terms above expressed, as affecting the father's rights and powers over the settled estate, and as conferring rights upon the heir of the marriage.

The father is the heritable proprietor of the lands, both in virtue of his title existing as at the date of the marriage-contract, and in virtue of the contract, which, as above expressed, does not divest him. Under the contract he remains the heritable proprietor as before. The contract, in fact, as above expressed, disposes the lands to him first, and then to the heirs of the marriage; making him the institute and fiar, and the issue of the marriage only heirs of provision. But, in respect to the father and the heir of the marriage, the effect would be the same, although the contract disposed to the father in liferent, and the heirs of the marriage in fee; or simply to the heirs of the marriage, without mentioning him at all. In all these cases the father would be, and remain, the feudal proprietor of the fee. The father, as such proprietor, is entitled at any time during his life, and without the consent of the heir of the marriage, to burden the lands for onerous causes; and he can sell the lands, receive and discharge the price, and grant a good and valid title to the purchaser, as freely as if the lands had not been settled by the contract. In case of his selling, he is under no obligation to re-invest the price.¹ And his creditors in debts onerously contracted, even though due on personal securities only, and not specially charged on the estate, can attach and carry off the estate equally as if there had been no settlement upon the heirs of the marriage.

RIGHTS OF THE
FATHER UNDER
CONTRACT OF
MARRIAGE IN
THE ABOVE
TERMS.

The father, however, has, in the most onerous of all contracts, provided the estate, as he held and enjoyed it at the time of his marriage, to the heirs of his marriage; and he is not entitled gratuitously to defeat, or even to injure or affect, the rights of the heirs, unless and in so far as he has expressly reserved power to himself so to do. The claims of the heirs, though postponed in competition with those of purchasers or onerous creditors, are preferable in questions with gratuitous competitors. The

¹ Cunynghame, 17th Jan. 1804, M. 13,029.

Parent cannot reduce or set aside the rights of purchasers or ~~creditors~~ creditors, to whatever extent these may be to their ~~prejudice~~ prejudice; but they cannot be prejudiced by gratuitous ~~rights~~ rights. In the words of Lord Corehouse, they are 'heirs among creditors,' and 'creditors among heirs.' Thus, when the heir had become bankrupt, and the father endeavoured to exclude him on that account, it was found incompetent to do so.¹ Nor can he exclude because of the heir's insanity. But when lands had been provided to the heirs-male, whom failing, the heirs-female of a marriage; and when the only son of the marriage was insane; a disposition to the only daughter (being the next heir), and which was declared, *in gremio*, to be null in case of the son's convalescence, was held validated by the son having predeceased the daughter, whereby the daughter became next heir of the marriage.² Neither can the father restrict the right of the heir to an annuity, though he settles the estate on the children of the heir.³ Nor can the father affect the heir with the fetters of an entail, unless he has, by the contract, reserved power to himself to do so;⁴ nor with a trust, except for behoof of the father's creditors; in which case the trust-deed operates, with reference to the heir, as a heritable bond by his father to an onerous creditor would operate.

POWER TO
ENTAIL.

It is very common, however, when a family estate is settled on the heirs of the marriage, for the father to reserve power to himself to make an entail of the estate, and to impose on the heirs all the conditions of a strict entail. If the contract contains a reservation to that effect, it qualifies the heir's right, and prevents him from objecting to an entail. But care is here to be taken to make the reservation broad enough to include all the conditions necessary in an entail; because, if the reserved power specifies certain conditions or restrictions, without adding a general power to impose such others as may be necessary, the father is not entitled to impose any conditions except those specified in the reserved power.⁵ In M'Neil's case, power had been reserved to make an entail with prohibitions against alienation and contraction of debt, but without adding the prohibition to alter the order of succession. An entail was made, containing all these prohibitions, including that against altering the succession; and the Court reduced it entirely. The reservation must likewise embrace power to name additional heirs besides those set forth in the contract, otherwise the heirs in the contract only can be called by the entail.

It is also not very uncommon to introduce in a marriage-contract a reservation, under which the father can exclude or limit the right of the heir of the marriage, and prefer such heir's descendants, or some other of the children of the marriage. Various forms of a provision, such as that here referred to, will be found in our Style Books. There is much to be said in favour of a reservation which, while it does not authorize the father to disappoint the children of the marriage altogether, will give him

¹ Spiers, 28th July 1778, M. 13,026.

² Stewart, 2d March 1815, F. C.

³ Ormiston, 24th Jan. 1809, Hume 531.

⁴ Watson, 28th Jan. 1801, M. App. Provision to Heirs and Children, No. 4.

⁵ M'Neil, 27th Jan. 1826, 4 Sh. 393.

somewhat arbitrary power as regards the order in which his own sons and daughters shall succeed to his estate. Laying aside special cases, as requiring special precautions, it will in general be found salutary that the heir should be in the hands of his father, rather than the father in the hands of his heir. And the reserved power above pointed at is one by which the father will be entitled so far to alter the order of succession set down in the marriage-contract, as to prefer the issue of the heir to the heir himself, giving him only a right of liferent; or to prefer any son or sons, or the issue of any son or sons, of the intended marriage, to the eldest son or his issue; and the same with daughters: but nowise to prefer the sons of a subsequent marriage, or their issue, to the sons of the intended marriage, or their issue; nor to prefer any daughters of the intended marriage to any sons of that marriage; nor daughters of a subsequent marriage to daughters of the intended marriage. By such a clause, the father will have power, in case of the bankruptcy of his heir, or of the heir's insanity, to give him only an alimentary provision, or to exclude him; whilst, at the same time, the succession to the estate can be preserved in the ordinary legal line in all other respects; and the father can do so without introducing in his marriage-contract, as in the Style-Book form, any reference to his heir's bankruptcy or insanity,—a provision, the latter portion of which few persons about to marry could look at as otherwise than revolting.

There is a further power which ought, in general, to be reserved to the father in his marriage-contract, viz., that of granting reasonable and suitable provisions out of the settled estate in favour of his wife and children of any subsequent marriage, in case he has no other estate out of which to grant provisions upon such marriage. But it will be more convenient to postpone the consideration of that point until we have discussed those forms of the contract by which the father is wholly divested of his estate, or by which a proper *jus crediti* therein is created in the heir; making him not merely an heir, but actually a creditor of his father, and entitled to be ranked as a creditor among creditors during his father's lifetime.

The heir of the marriage, as we have seen, is entitled to have the estate, if it is not sold by his father, free of all burdens and restrictions not existing at the time of the marriage, and not expressly authorized by the contract; and, though he cannot prevent his father from selling, yet, if a sale shall take place, the heir is entitled to claim the price as a *surrogatum* for the lands; just as he would have had right to the lands if unsold. That is, his claim will be postponed to that of his father's onerous creditors, and burdened with reasonable provisions to his father's wife and children of a second marriage, if any, but preferred to all claims founded on merely gratuitous deeds. He is not, however, entitled to the value of the lands sold, as at the time of his father's death; or to the lands, if any, bought with the price received for such lands.¹

RIGHTS OF THE
HEIR OF THE
MARRIAGE.

¹ Cunningham, 20th Dec. 1810, F. C.; affirmed, 20th May 1818, 6 Paton's App. Earl of Wemyss, 28th Feb. 1815, F. C.; 390.

WHEN FATHER
DIVESTED OF
FEE.

We are now to consider the form of the marriage-contract when it is intended at once to divest the father of the fee or property of the lands. There are two ways in which that can be done,—(1.) The father can dispose the lands to trustees, for behoof of himself in liferent, and the heirs of the marriage in fee, under burden of the stipulated provisions to the wife and younger children; or (2.) under the like burden, he can dispose to himself in liferent, for his liferent use allenary, and to the heirs of the marriage in fee. The father will be divested, in either case, after registration of the marriage-contract, or separate deed of trust, or other deed, if there is one, in the Register of Sasines, or after notarial instrument or sasine thereon, in usual form; the warrant of registration, or the notarial instrument, or the instrument of sasine, (in the case of the disposition to the father in liferent allenary, and to the heirs in fee), being always so framed as to embrace the fee as well as the liferent. By the disposition to trustees, for the purposes before expressed, when followed by sasine or its equivalent, the father is obviously divested.

INFESTMENT
OF HEIR.

Where the disposition is to the father in liferent allenary, and to the heirs of the marriage in fee, there can be no infestment or real right in favour of a proper fiar having the beneficial right; because there is no heir of the marriage in existence who can be infest. But the disposition conveys the entire estate, both liferent and fee, and authorizes sasine therein or its equivalent accordingly, and the disposition is intended to restrict the father's right to a mere liferent. Under the old law, the fee existing in the father, in virtue of the prior titles, could be taken out of his person, and a valid infestment of the fee could be immediately obtained for behoof of the unborn heirs of the marriage, by expeding and recording an instrument of sasine upon the disposition, and in the exact terms of the disposition; viz., in favour of the father in liferent, for his liferent use allenary, and the heirs of the marriage in fee. An infestment in these terms would have divested him of the beneficial interest in the fee, and would have made him hold the fee only as trustee for the heirs if they should exist.¹ And it was not necessary in the sasine to adopt the *ipsissima verba* of the disposition or precept; though failure to do so was blameable on professional grounds. Thus, where the precept was in favour of the mother in liferent, and the children to be born of the marriage in fee, in security of a sum of £3000 provided to her in liferent, for her liferent use only, and to the children of the marriage in fee,—sasine given to the mother for herself and on behalf of her children was found effectual to constitute a fiduciary fee in the mother for the children.²

If the sasine were simply in favour of the father in liferent, for his liferent use allenary, it would embrace no more than the liferent right. He held the fee under his prior title; and the sasine on the marriage-contract, in the mere liferent, would leave the fee in his person, just as it stood before the contract was executed. The father had indeed granted a conveyance which embraced the fee; but no sasine had

¹ Houlditch, 9th June 1847, 9 D. 1204.

² Barstow, 18th Feb. 1858, 20 D. 612.

followed thereon as to the fee ; and his creditors could therefore attach the estate, as standing vested in his person under the prior investitures, and carry it away from the heirs of the marriage ; the right of such heirs being merely personal, in virtue of the conveyance contained in the marriage-contract.¹

CHILDREN'S
PROVISIONS.

Under the law as altered by the Titles Acts, a real right can be obtained either by registration of the conveyance with warrant of registration thereon, or (if the conveyance is contained in a marriage-contract, or other deed granted for further purposes or objects) by notarial instrument thereon. But as it was in the case of the instrument of sasine, so here it is necessary to embrace the right of fee, as well as the liferent, in the warrant or notarial instrument. For that purpose, the warrant of registration, if framed as recommended by the Court in reference to an instrument of sasine in Houlditch's case, will run thus :—' Register on behalf of A. B.' (the father), 'and the heirs of the marriage, for their respective rights of liferent and fee ;' or, taking the form which the Court thought sufficient in Barstow's case :—' Register on behalf of A. B.' (the father), 'for himself in liferent, for his liferent use only, and for behoof of the heirs of the marriage in fee.' The notarial instrument, in cases where it is competent and made use of, will be in corresponding terms.

Either of these courses would, I think, divest the father of the fee, and give the heirs of the marriage a real right, equally with the old form by sasine. And here it is proper to point out the distinction between the cases of Falconer and Houlditch on the one hand, where the fee in the father was attached by his creditors, and carried away from his children, and that of Newlands formerly referred to, on the other hand, where the father's creditors were held to be excluded ; the terms of the conveyances in all these cases being *verbatim* the same, viz., to the father in liferent allenary, and his children *nascituri* in fee ; and there having been no sasine in the case of Newlands, any more than in those of Falconer and Houlditch. The distinction was this :—In Newlands' case, the father had no right independently of the disposition granted to him in liferent allenary. He was not proprietor of the lands under a prior title, as the parties were in the cases of Falconer and Houlditch. The disposition to him in liferent allenary formed his sole title ; and his creditors could take nothing more from him than he had under that disposition. The result would have been the same in the cases of Falconer and Houlditch, if the fathers had had no title except the conveyances to them in liferent allenary, which were contained in their marriage-contracts, or relative deeds. In such circumstances, their creditors could have taken only their liferent rights. But, in these latter cases, the fathers were proprietors and fiars of their estates, independently of the marriage-contracts. The dispositions in the marriage-contracts, and sasines thereon in the liferent rights allenary, did

WHEN FATHER
HAS NO PRIOR
TITLE.

¹ Falconer, 22d Jan. 1824, 2 Sh. 633 ; Houlditch's case.

not divest them of their prior rights; and their creditors attached the lands as held under these prior rights. In principle, what occurred in Falconer's and Houlditch's cases is the very same that may occur in any ordinary case of the conveyance of lands not timeously followed by sasine or its equivalent. When a purchaser obtains a disposition, and does not expedite sasine or its equivalent, he does not divest the seller: the seller's creditors can accordingly attach and carry off the lands at any time before the purchaser is infeft or registered. But, in such cases as Falconer's and Houlditch's, the heirs of the marriage, though for want of sasine or registration applicable to their right of fee they may be deprived of the fee of the lands intended to be secured to them, are proper creditors of their father, and will be ranked on his estate *pari passu* with ordinary personal creditors for the price of the estate when sold, under deduction of the value of their father's liferent right.¹

PROVISIONS
TO YOUNGER
CHILDREN.

The next branch of the marriage-contract is that by which provision is made for the younger children of the marriage, or for the children generally, as the case may be.

WHEN ESTATE
ENTAILED.

We shall here consider, in the first place, the case of provisions to younger children granted by proprietors of entailed estates. These may be either in virtue of powers in the entail, or under the Aberdeen Act.² When granted under powers in the entail, the particular terms of the power must be strictly observed. In general the principles applicable to this case, and to that of provisions under the Aberdeen Act, are the same; and I will here notice only peculiar cases arising under powers in entails.

1. Where the entail gives power not only to grant provisions to the younger children, but to give security therefor by conveyance of part of the estate in locality, the conveyance in locality may be competently granted to a trustee for the children,—which will exclude any difficulty as to their being themselves registered or infeft. It would seem that the father himself may be the trustee for them.³ But it is not desirable that he should be so, as it is his own obligation that is to be secured. The intended wife is sometimes made the trustee; but it would be more advisable to get a third party interposed.

2. When the power is to grant provisions to 'younger children other than the heir,' an heir in possession whose children are not called to the succession cannot burden the estate with a provision to his younger children. The heir in possession can have no 'younger children' in the sense of such a power, when, by the terms of the destination, no child of his at all can be entitled to succeed.⁴ But that case is to be distinguished from the case of an heir in possession who has daughters not called by the entail, and whose son, if he had one, would succeed. When disposing of Dickson's case, the Lord Justice-Clerk Hope said that under

¹ Falconer's case.

² 5 Geo. IV. c. 87.

³ Gibson, 4th Feb. 1726, M. 12,885.

⁴ Dickson, 4th July 1851, 13 D. 1291, and sequel, 4th Feb. 1852, 14 D. 432; affirmed 13th June 1854, 1 Macq. 729.

such circumstances a general power in an entail to grant provisions to younger children would authorize the heir in possession to make provisions for his daughters, and likewise to grant provisions to daughters in the character of 'younger children,' although senior in point of age to the son who shall succeed. In Dickson's case, which arose under the powers in an entail, the effect of the Aberdeen Act in reference to a similar destination was expressly reserved.

CHILDREN'S
PROVISIONS.

3. The provisions under powers in an entail, though not payable until after the granter's death, may, if so desired and expressed by the granter, become vested in the child, and be transmissible by him to assignees, if granted as part of a marriage-settlement, and by a deed which is delivered during the father's lifetime; and that although the child shall die during the granter's lifetime; supposing always that there is nothing to the contrary in the entail. In the case of Oswald,¹ the entail provided that if the children to whom provisions were granted should allow such provisions to remain unpaid for six years after their majority, they should lose their claim on the entailed estate. The provision (which was granted to the daughter of the heir in possession) was not payable till after the granter's death, and the Court held that the same would affect the estate although the granter should live for six years after his daughter's majority.

4. When the entail allows new provisions only on those already granted being cleared off, an heir of entail, granting new provisions for behoof of his daughter on her marriage, is bound (even without special stipulation to that effect) to clear off the old provisions, so as to make the new effectual.²

5. When the entail authorizes the heirs to burden or affect the lands and estate with sums of money for the suitable provision of younger children, the power will be effectually exercised by means of bonds narrating the power, and binding the granter and heirs of entail personally, in conjunction with all his other heirs, though not conceived in the form of securities over the lands. This was held to fall within the meaning of the power to burden or affect the lands and estate.³

6. The provision may be granted to trustees for the younger children, in place of to the younger children directly. But, so far as the purposes of the trust are not for the benefit of the younger children or their issue, the provision will not be effectual against the estate.⁴ In connexion with this point it may be noticed (though the case arises under an Aberdeen Act bond), that, when the provision is granted by the father voluntarily and gratuitously, it is not competent to the child in whose favour it is granted, or to his assignee, both to claim the provision and to reject a condition, in itself lawful, annexed to it by the father. How

¹ Oswald, 20th Dec. 1821, 1 Sh. 225.

² Sinclair, 22d Jan. 1840, 2 D. 356.

³ Cleghorn, 18th Jan. 1833, 11 Sh. 259.
Remitted for consideration on appeal, 8th
Sept. 1835.

⁴ Strathallan, 20th May 1840, 2 D. 840;
affirmed 28th Aug. 1846, 5 Bell's App.
396; Breadalbane's Trustees, 26th May
1840, 2 D. 904 & 944.

amount to the younger children, so far as it shall not be due under the powers of the entail, the subsidiary obligation expressed in the above form would not fully meet what is wanted. It ought to be accompanied by an obligation of guarantee by the granter, binding himself and his heirs and successors whomsoever, that the provisions granted shall amount to not less than the sums specified in the above events respectively.

Provisions granted under powers in entails will affect the fee, as well as the rents of the estate, if the entail has no clause to the contrary. Being granted under powers conferred by the maker of the entail, they are, in this respect, on the same footing with the entailor's own bonds. To the extent of the reserved powers, the estate is fee-simple. But entails usually stipulate that such provisions shall never be made to affect the estate further than as redeemable securities over it; and the Aberdeen Act expressly declares that provisions granted to children under it shall affect the rents of the estate only, and the persons of the heirs of entail; and further, that the heir in possession shall be free, in all cases, on assigning to a trustee one third part of the rents of the estate during such heir's lifetime, or until the provisions shall be paid off out of such rents (sect. 10). Moreover, the powers granted by the Aberdeen Act, and by the Montgomery Act,¹ to encourage the improvement of lands in Scotland held under strict entail, are never to be exercised to such extent as to deprive the heir in possession of more than two-thirds of the free yearly rents or proceeds of the estate (sect. 13). There may thus often be good ground for requiring the personal guarantee of the granter of entail provisions, that certain specific sums shall be made up to the grantees.

**FEE-SIMPLE
ESTATE.**

When the husband's estate consists of lands not held under strict entail, the principles applicable to his granting provisions to his whole children, or to his children other than the heir, are the same as those applicable to similar provisions granted by a father whose estate consists of money, or of stocks, or of any other subjects. It is therefore unnecessary to give any exemplification of clauses applicable specially to the case of the proprietor of lands not entailed. Laying aside entail provisions, which must be granted in strict accordance with the powers in the deed of entail or Aberdeen Act, the principles applicable to all other cases are substantially alike.

As to such other cases, it is necessary, in the first place, to keep in view the questions, whether or not the children are to have a proper *jus crediti*, or claim on the footing of creditors, against their father during his lifetime, and in competition with his ordinary personal creditors; and whether their provisions are to be specially secured or not. The mode of giving security, if that is to be done, will, of course, vary according to the nature of the father's estate. But the question, whether the children have, or have not, a *jus crediti*, depends on the terms in which the clauses in their favour are expressed.

¹ 10 Geo. III. c. 51.

In regard to this last very important and very critical point, the general presumption is against holding the father to have made his children his creditors; an arrangement to which, when accomplished by a mere personal obligation, I think there is, on principle, very great objection. But the main object of the Court, in each case, is to give effect to the true meaning and intention of the parties, as gathered from the deed itself, or from the deeds constituting the settlement, if there are several. And here I may repeat, that, in questions of construction, regulated by meaning and intention, each case is to be judged of by its own circumstances. The late Lord Balgray says, 'It is always a *quæstio voluntatis*, and as in every such case it must happen that the intention (of the party) is to be gathered from various circumstances, sometimes minute in themselves, the decisions have an appearance of being arbitrary. It cannot well be otherwise. But still the principle to be applied is certain; though the manner of its application will depend on the circumstances of each case.'

PRESUMPTION
THAT CHILDREN
NOT CREDITORS.

In the cases now under consideration, the provisions are most usually granted by simple personal obligation from the father in favour of the children; the amount payable will vary according to their number; the term of payment will be the first term of Whitsunday or Martinmas after the father's death, and after the children's majority in the case of sons, and marriage or majority in the case of daughters; with penalty as usual in case of failure, and interest in the ordinary form of a personal bond. The interest will, in general, run from the date of the father's death, even though the principal be not payable until afterwards. In these cases, equally as when a land-estate is settled on the heirs of the marriage, the father cannot revoke or alter the provisions, or defeat them by any gratuitous deed. But the children have no proper claim as his creditors until after his death; there is no actual benefit or interest which can be claimed or taken by them until after that event; and they are regarded as, to a large extent, heirs, and as having, in a large sense, a mere right of succession. In case of their father's bankruptcy, they cannot be ranked upon his estate; and even in case by his death the term of payment of their provision, or of the interest on it, may arrive, they have no claim in competition with ordinary creditors.¹ They have, however, something more than an ordinary *spes successionis*; because their father cannot gratuitously defeat their right. They are, in Erskine's words, not merely heirs, but *quodammodo* creditors.²

Thus far the construction given to the obligation is clear and undoubted; and a father who grants provisions to his children, in the terms before quoted, will be held to mean that the children shall have no claim as against himself, or in competition with his ordinary creditors.

It is equally clear that, when the father gives his children a proper claim and ground of action against himself during his life, or

¹ Browning, 25th May 1837, 15 Sh. 999; Goddard, 9th March 1844, 6 D. 1018.

² Erskine, iii. 8. 38.

CHILDREN
CREDITORS.

places himself under restraint on account of their provisions, they are his creditors, and can compete with his ordinary creditors as claimants upon his estate, either during his lifetime or after his death.

Thus, where the provision from a father is payable to his children at their majority or marriage, they are creditors; because these events may happen during their father's lifetime.¹ They are equally creditors where the interest of the provision by the father is so payable;² and they are creditors, in that case, for the principal, though payable only after their father's death, as well as for the interest; because an obligation to pay the interest of a principal sum from a term which has arrived, coupled with an obligation to pay the principal at a term which has not yet arrived, implies an obligation to secure the principal, so as to meet the payment of the interest, and of the principal itself when it becomes due.³ It would seem that the children are creditors also where the provision from their father is payable at the dissolution of the marriage; because that event may happen during their father's lifetime.⁴

But where the father's obligation, though for payment at the majority or marriage of the children, is followed by a declaration that the money shall not be paid till twelve months after his death, this last clause controls the first, and makes the children only heirs among creditors.⁵ And when the amount payable under the father's bond of provision was made dependent on the contingency of the father's estate devolving at his death upon an heir of his first or of a subsequent marriage, the children were held to be heirs among creditors, though by the bond in their favour their provisions were payable at their majority or marriage; because the succession to the estate, on which the amount payable depended, was an event which could not occur until their father's death.⁶ It has no effect in conferring a *jus crediti*, that the father, instead of being simply bound to pay a sum to the children, engages to provide and secure to them a sum so payable.⁷ Where the terms employed in the obligation itself do not constitute a proper *jus crediti*, the use of the same terms in giving security for fulfilment of that obligation will not alter the nature of the right of the children,—securities, in general, being only accessory rights.⁸

PROVISION TO
FATHER IN
LIFERENT.

Provisions granted by way of obligations to the father in liferent, and the children in fee, stand on the same footing with conveyances in these terms, to which I have already directed your attention in connexion with the subject of the settlement of a land-estate upon the heirs of the marriage. In both cases the father is *fiar*: the children are heirs only, and not creditors. And where there is an antenuptial contract,

¹ Ballingall, 31st Jan. 1759, M. 12,919; Cruikshank's Trustees, 2d Nov. 1853, 16 D. 7.

² Mackenzie's Creditors, 2d Feb. 1792, M. 12,924; Bell's Quarto Cases, 404.

³ See the above cases, and opinion of Lord Corehouse and other Judges in Herries, Farquhar, & Co., 16 Sh. 967.

⁴ Lord Ivory in Goddard's case.

⁵ Brown, 1st Feb. 1820, F. C.

⁶ M'Tavish, 15th November 1787, M. 12,922.

⁷ Bell's Comm. i. 640; and Lord Moncreiff in Goddard's case.

⁸ Brown's case; and Poole, 22d Feb. 1834, 12 Sh. 481.

with a provision destined to the father in liferent, and children *nascituri* CHILDREN'S PROVISIONS. in fee, it makes no difference that in implement thereof a bond is granted, after the birth of a child or children, in favour of the father in liferent, and the children procreated or to be procreated of the marriage in fee. The marriage-contract is the ruling deed ; and the father is still *fiar*, and the children heirs among creditors.¹

On the other hand, here, as in the case of conveyances of lands, the intention that the father shall have a liferent only, and the children the fee, will be effectually shown by the use of the word 'only,' or 'allenary,' as relative to the father's liferent right. Thus, a bond to the father in liferent, for his liferent use allenary, and to the children *nascituri* in fee, will make the children *fiars* and creditors under burden only of the father's liferent right.² And in the case of Millar,³ the Court—guided still by their view of the true meaning and intention of the parties—held the father only a liferenter, in circumstances many of which had much resemblance to those in Macdonald's case.

In examining these and other cases, it cannot fail to be observed that expressions, and even clauses, of apparently similar import, sometimes are held as of weight, sometimes not. Each case, in fact, stands by itself. The terms of the deeds often render the application of the undoubted principle of construction very difficult ; but this ought not to be so. The Conveyancer ought first to ascertain the views and intentions of the parties, and then to give distinct and clear expression to them. No room should ever be left for mere inference on a point so important and so easily dealt with as this.

The cases before cited are those of personal obligations ; some creating a *jus crediti* in the children, others not. We also occasionally meet PROVISION OF CONQUEST. with a provision to the children of the conquest during the marriage ; especially when the wife is to have the liferent of the conquest, or a share of it ; and the cautions formerly given as to defining what is included under the term 'conquest,' and the father's powers, in case these are to be qualified, apply equally to the children's as to the wife's provision. If the father's powers are not qualified, the provision to the children does not interfere with the father's right of administration and disposal of the conquest during his lifetime. He is restrained from disappointing the children gratuitously ; but *quoad ultra* they are only heirs, and their father is not subject to diligence at their instance.⁴

Another form of providing the children, met with in two cases, is by binding the wife, in the event of there being children, to pay them a certain portion of her jointure, or by restricting her liferent provision, in that event, to a particular sum, and declaring the balance or surplus to belong to the children. A provision so constituted is not affectable by the husband's creditors. But the form is probably not much in use now.⁵

¹ Macdonald, 14th Jan. 1831, 9 Sh. 269.

² Watherstone, 25th Nov. 1801, M. 4297 ; Greenhill, 24th June 1824, 3 Sh. 170 ; Rollo, 28th Nov. 1832, 11 Sh. 132.

³ Miller, 14th Nov. 1833, 12 Sh. 31.

⁴ Erskine, iii. 8. 38, 39 ; Frazer, 13th Feb. 1677, M. 12,859.

⁵ Creditors of Kinminity, 20th Jan. 1756, 5 Br. Sup. 842 ; Blairs, 5th Aug. 1782, M. 2280.

TRUST FOR
PAYMENT OF
PROVISIONS.

It is by no means uncommon, however, when the liferent of the husband's property is wholly or nearly absorbed by the wife's jointure, and when there is no restriction of her right in the event of a second marriage, to burden her with the maintenance and education of the children until they are able to maintain themselves, or are otherwise sufficiently provided for, or, if daughters, are married.

We proceed to cases in which security is given, not simply in favour of the children *nascituri*, but to trustees for their behoof for payment of the children's provisions.¹ It is now settled, that although the personal obligation may be so framed that it would not by itself give any *jus crediti* to the children, as against their father, or in competition with his ordinary creditors, the security, if duly perfected in the person of the trustees, will give the children not merely a *jus crediti*, but a preference over the subjects of the security, according to the order in which the trustees' real right is completed by registration or otherwise. In the cases to be quoted on this point, heritable security was given; and when the father has an unentailed land-estate he will, in general, give the security over it. But when special security is duly given to trustees for the children, over moveable or personal estate, the children will equally have a *jus crediti* and a preferential right over such estate.

The leading case of the class under consideration is that of *Herries, Farquhar & Co.*,² in which the opinions of the whole Court were taken, and the Judges were unanimous, though not all equally clear and decided. In that case, the father, by his antenuptial contract, became bound to pay a sum to the younger children of his marriage, at such times and in such proportions as he should appoint by any will or other writing to be executed by him. Failing appointment, the sum was to be divisible among the children equally, and to be payable within six months after his death, with interest from the day of his death. The above obligation would, by itself, have made the children only heirs among creditors; and the contract contained no other obligation for payment of the sum in question. It contained, however, a precept of sasine, *inter alia*, for infesting trustees for behoof of the younger children in security and for the more sure payment of their provision. There was also a disposition of the lands by the father to himself and a certain series of heirs, under express burden of the provision to the younger children. Infestment was taken by the trustees in security of the provision, and likewise by the father himself under burden of the provision. In these circumstances, the Court, in an action with subsequent creditors of the father, held the trustees, as infest in security of the children's provisions, entitled not merely to compete as ordinary creditors of the father with the diligence of his other creditors, but to be ranked as real and preferable creditors on the lands in their security, in the order of priority corresponding to the date when their real right was completed.

¹ See *Annand*, 4th March 1774; affirmed 23d March 1775, 2 *Paton's App.* 369.

² *Herries, Farquhar, & Co.*, 9th March 1838, 16 *Sh.* 948.

The principles of this decision are set forth in the opinions of Lords Corehouse, Moncreiff, and four other Judges; and they appear to resolve into this, that there is no rule in the law of Scotland to render a stipulation by a father in his antenuptial contract, whereby the children of the marriage are made his creditors, illegal or ineffectual; and that it therefore becomes a question of construction, in each case, what is the import of the clause of provision adopted by the parties. Applying these principles, the Court held the granting of the security to the trustees as importing that the father was to be laid under restraint; and that it was the intention of the parties that the provision should, in all events, be made effectual to the children. In fact, they held the security granted to the trustees for the children as equivalent to security to the children, *nominatim*, after they came into existence.

There are other cases to the same effect, particularly that of Bushby,¹ where, as in Herries, Farquhar & Co.'s case, the provision was payable only after the father's death; but a security was created over his lands in favour of trustees for the children. The deed of security provided that the father should have power of redemption, but only on paying up the amount to the trustees, who were, in that case, to lend out the same on new security. In these circumstances, the Court were of opinion that the presumption of the fee being in the father was redargued by the conveyance to trustees, and by the security which was given them in implement of the obligation; and that the intention of the parties clearly was to give the fee to the children.

The mode of creating the security in favour of the trustees, and the purposes of the trust in their persons, may here be shortly noticed. If the husband possesses land-estate of the requisite value, he can, of even date with the marriage-contract, grant a bond and disposition in security over the same, for payment of the stipulated provisions at the first term of Whitsunday or Martinmas after his death, or in his option at any earlier or later term. The destination in the obligation and dispositive clause will run, as usual, in favour of the trustees named, and of any additional trustees to be subsequently named or assumed, as will be more fully stated afterwards in connexion with the framing of proper testamentary trusts. The marriage-contract, in such a case, will refer to the bond and disposition in security, saying that in contemplation of the marriage the husband has granted such bond of even date with his executing the marriage-contract.

If, again, the husband is to impress money into the trustees' hands, he will bind himself by the marriage-contract to do so within some short space after the celebration of the marriage. And, if he is to place securities in trust, he will grant a separate assignation thereof to the trustees, and in the marriage-contract say that he has done so, as in the case of granting his own bond and disposition in security.

In all these cases the marriage-contract will declare the purposes of

¹ Bushby, 23d June 1825, 4 Sh. 110.

parents to their children, the condition '*Si sine liberis decesserit*' comes into operation ; so that the issue of a child predeceasing the term of payment is entitled to the share which would have fallen to his parent if he had survived.¹ Moreover, where the provision emanates from the father, it has been said that his power of division authorizes him to apportion among the issue of a deceased child the share which would have fallen to their parent if he had survived.²

HUSBAND'S
SECOND
MARRIAGE.

I have already suggested that when a husband is making an antenuptial settlement of the whole, or substantially the whole, of his estate upon the occasion of his first marriage, and when such estate is not of very small amount, power should be reserved to him to grant suitable provisions out of the same estate to his wife and children of a subsequent marriage, in case at the time of such subsequent marriage he has no other estate out of which to grant suitable second provisions. This is a usual and expedient clause in the above circumstances ; a qualification being generally added that the amount of the second provisions shall not exceed one half of the settled estate. When the heir of the marriage is only an heir among creditors, the father undoubtedly has power, without express reservation, to grant rational provisions in favour of his wife and children of a second marriage, though these shall encroach on the provisions made for the children of the first marriage.³ But excessive provisions in such a case will not be allowed. In the case of Bruce,⁴ a provision was granted, by postnuptial contract, shortly after the second marriage, in favour of the wife and children of that marriage, which original provision was reasonable in amount, and was effectual. A good many years later, when a large family had been born of the second marriage, an additional provision was granted for their behoof. The additional provision was reduced, as *in fraudem* of the contract made on the first marriage. A similar principle was applied in the case of a second marriage and postnuptial contract;⁵ and likewise in a case where the contract, on the occasion of the second marriage, was antenuptial ; the Court having refused to sustain provisions, so far as extravagant, in prejudice of those granted to the children of the first marriage.⁶

When the heir of the marriage is made a proper creditor, and, still more, if the father is divested of the estate by a conveyance thereof to trustees, the case is less favourable to the wife and children of the second marriage. Professor Bell, in his Commentaries,⁷ says that, when the heir is a creditor, the natural obligation on the father to support and aliment his wife will sustain the provision to his wife of a second marriage to a moderate extent. But he expresses a different opinion in his Principles;⁸ and, since the last edition of his Principles was issued, the case has been before the Court, in circumstances not unfavourable to the

¹ Wood, 26th June 1789, M. 13,043.

² Menzies, p. 443.

³ Bell's Principles, 1981, and cases cited. 987.

⁴ Bruce, 7th Feb. 1761, M. 13,036.

⁵ Wood, 3d Dec. 1823, 2 Sh. 549.

⁶ Duncan, 8th February 1785, M.

⁷ Bell's Comm. i. 642.

⁸ Bell's Principles, *ut supra*.

second wife. The husband had, by postnuptial contract with his first wife, conveyed his estate, which consisted of lands, to trustees for the children of the first marriage by name, making these children creditors. He conveyed the same lands to his second wife in security of her provisions; and she was first infeft, and her claim was not gratuitous. In a competition between her and the children of the first marriage, the Judges of the First Division were equally divided on the question whether her provision should be sustained to a reasonable and moderate extent, or set aside altogether.¹ The case was compromised, and the point of law remains undecided. Where, therefore, there is a trust-conveyance for behoof of the children of the first marriage, and the title of the trustees is completed, the reservation to the father of power to grant suitable provisions out of the trust-estate to his wife and children of any second marriage is probably indispensable, because the father is divested. There is also much reason to doubt the validity of provisions to the wife and children of a second marriage, even out of a fund in which the children of the first marriage have no real right, but only a proper *jus crediti*. In such case likewise, therefore, it is advisable to insert a similar reservation in favour of the husband.

The next clause is a declaration that the provisions in favour of the children shall be in full satisfaction to them of their right of legitim, and of all they can claim by law from their father, or his estate, through his decease. This declaration may or may not be made under the exception of his goodwill, and that the children may succeed to him as his heirs-at-law or next of kin, in case or so far as he shall not otherwise dispose of his estate.

The right of legitim requires to be very clearly discharged in order to be excluded.² The doctrine here laid down is fully illustrated by decisions. Thus the legitim is unaffected by a daughter's acknowledging that certain sums had been conveyed to her at her marriage in part of her patrimony.³ Again, the receipt by a daughter on her marriage, contained in Articles of Marriage in the English form, for a sum from her father as 'her portion, or fortune,' was held not to import a discharge by her of her legitim.⁴ And, however clear and express may be the words of exclusion employed by the father after his marriage, in order to defeat the child's right of legitim, such exclusion cannot be accomplished by any postnuptial deed executed by him. The exclusion by him, in order to be effectual, must be before his marriage.⁵ But where the father leaves a universal settlement of his estate, including the share thereof claimable by his children as legitim, and containing contingent provisions in favour of one of his children (a daughter), such child is not entitled to draw the legitim in opposition to the provisions of the universal settlement, and

¹ Guthrie, 21st Nov. 1846, 9 D. 124.

² Stair, iii. 8. 45.

³ Clark, 27th Jan. 1835, 13 Sh. 326.

⁴ Marquis of Breadalbane, 30th Jan.

1836, 14 Sh. 309; affirmed, 16th August

1836, 2 Sh. & M'L. App. 377.

⁵ Hog, 7th June 1791, M. 4619.

likewise to take benefit under the settlement. She must make her election of one or other, and is not entitled to delay the election, in respect that the testamentary provisions are contingent. She must make her election at once; the representatives of the deceased being bound, in the first place, to give her all the information requisite for enabling her to do so advisedly.¹

Where, however, the father simply appoints his wife to be his 'sole executrix and universal legatory, with full power to intromit with' his 'whole moveable estate and executry of every description,' this is held to include only the dead's part or share of moveable estate at the father's disposal; and a daughter, ratifying her father's deed in the above terms, is held not thereby to give up her claim of legitim.²

The right of legitim belongs to the children who survive their father generally; and we have seen that when there are surviving children and no surviving widow, or a widow and no surviving children, the goods in communion divide into two,—the children, or the widow (as the case may be), taking the one half, and the other half being dead's part, or executry. But though there shall be a surviving widow, yet if she has discharged her *jus relictae*, her discharge will operate in favour of the surviving children in the same way as if she had predeceased her husband. The children will, in that case, take half of the goods in communion as legitim.³ And where the father, during his lifetime, has obtained from one of the children contingently entitled to legitim, and who survives his father, a discharge or renunciation of his legitim, the discharge operates in reference to the other surviving children's claim of legitim in the same way as if the child who granted it had predeceased his father.⁴ The same principle was forcibly illustrated in a case where, in an antenuptial contract, the wife had renounced her *jus relictae*, and provisions were granted to the younger children in satisfaction of their legitim. In these circumstances, the eldest son, for whom no provision had been made by the marriage-contract, and whose right to legitim was not thereby excluded, was found entitled to the entire half of the goods in communion as legitim.⁵ When, however, the provisions which are declared to be in full of legitim, are granted 'to the children of the marriage,' the word 'children' includes the heir of the marriage as well as the other children, and prevents such heir from claiming legitim.⁶

But the discharge of legitim arising by a child's acceptance, after his father's death, of a special provision contained in a general settlement by his father, and thereby declared to be in lieu of such child's legitim, does not increase or alter the other children's claim. The rights of legitim, and other rights arising by law, in the father's moveable estate, become fixed and vested upon the father's death. Upon that event, any

DISCHARGE
OF LEGITIM
DURING
FATHER'S
LIFETIME.

AFTER
FATHER'S
DEATH.

¹ Keith's Trustees, 17th July 1857, 19 D. 1040.

² White, 14th Nov. 1861, 24 D. 38.

³ Nisbet, 18th Jan. 1726, M. 8181; affirmed as to this point, 7th March 1726, Robertson's App. 594.

⁴ Hog, 7th June 1791, M. 8193.

⁵ Lord Panmure, 28th Feb. 1856, 18 D. 703.

⁶ Keith's Trustees, *supra*.

child not legally excluded is entitled to claim his legitim, unless he prefers the special provision granted in lieu of it. If he claims the legitim, he will forfeit the special provision, which will fall to his father's general donee, or other person entitled to the residue of his father's estate. On the other hand, if he accepts the special provision granted by the general settlement in lieu of legitim, his acceptance thereof operates as an assignation or discharge of his share of the legitim to the general donee.¹ And here it may be noticed, that the discharge by one of several children, even though granted during his father's lifetime, of his share of a conventional provision to children, payable under his father's marriage-contract, does not operate to increase the shares of the other children in such provision, but in favour of the father.²

CHILDREN'S
PROVISIONS.

A question has sometimes arisen, whether the legitim can be drawn, in addition to a special provision made by antenuptial contract, but which is not expressly declared to be in lieu of legitim. It was decided in the House of Lords, in Nisbet's case, already referred to (reversing the judgment of the Court of Session on that point), that the legitim was not excluded by the mere granting of a special provision, but that the amount drawn as legitim was to be imputed towards the special provision, the latter having been apparently the most valuable of the two. In other words, the children were not entitled to take both. In a recent case, in which Nisbet's case seems not to have been referred to, and when there was no opposition,³ the Court of Session allowed a child to draw both; and in the more recent case of Keith's Trustees, above referred to, the Court found the testator's daughter entitled to her legitim in addition to a provision granted to her by her father in his antenuptial contract, made in the English form; holding further, that the antenuptial provision was, like a debt due by the father, to form a deduction, not specially from the legitim, but from the whole free moveable estate of the deceased as at the time of his death.

I may here notice that personal bonds, though excluded from the rights arising by marriage to the husband and wife (if overdue as at the time when they fall to the husband or wife),⁴ fall, nevertheless, under the children's claim of legitim.⁵ The exclusion of the rights of the husband and wife, in the case of bonds so overdue, arises by Statute, and does not extend to the children. Where not so overdue, such bonds are on the same footing with other personal estate, so far as regards the spouses and their children.

PERSONAL
BONDS.

We have next to consider as to the disposal of the wife's property, or the provisions to be made on her part, by the marriage-contract.

PROVISIONS
BY WIFE.

When the wife's property is not of large amount with reference to

¹ Fisher, 16th June 1840, 2 D. 1121.

² Allardice, 12th Feb. 1721, Robertson's App. 399. The principle of this decision appears to be similar to that which ruled in Routledge's case, and

which was explained in connexion with that case. See *ante*, p. 820.

³ Fraser, 17th Dec. 1835, 14 Sh. 174.

⁴ 1661, c. 32.

⁵ Nisbet's case.

the position of the parties, and when the husband is making suitable provisions in favour of his wife, and giving full security to her, it is a very common and I think a reasonable arrangement, for the wife to convey to her husband *simpliciter* whatever property, heritable or moveable, she has at the time, and all that shall fall to her during the subsistence of the marriage. What may fall to her after the dissolution of the marriage ought never to be so conveyed. When the husband grants suitable provisions, without giving security, or when he becomes bound, in certain expected contingencies, to grant suitable provisions with security, it is a common arrangement to convey the wife's property to trustees, to be made over to the husband either on his giving security, or granting the contemplated provisions with security, as the case may be; meantime to be held for the husband and wife in life, and, in case the contemplated security, or provisions and security, are not granted, to be held for the wife and her heirs or assignees in fee, secluding the husband's *jus mariti* and right of administration.

SETTLEMENT
UPON WIFE BY
ANTENUPTIAL
CONVEYANCE.

But it may often be desired to preserve the wife's property in any event for her own separate use. The arrangements met with for that end are various in form and character. The wife sometimes makes an antenuptial conveyance of her property to herself, exclusive of her husband's *jus mariti* and right of administration, and gives him either a present or prospective life, as may be arranged. Under such a conveyance and exclusion, the wife's property, if kept separate, and not amalgamated with the husband's estate or funds, will be protected against him and his creditors, and made available to the wife, agreeably to the terms of her conveyance,—to which he ought to be made a consenting party for his interest. But, unless trustees are interposed, there is always the risk that if the wife's estate and funds are realized the proceeds will get into the husband's power; or, if consisting of corporeal moveables, that they will become his by possession, and will be so mixed up with his own proper means or moveable effects as to be undistinguishable therefrom, and so liable to the claims of his creditors.¹ In order to complete security practically against such claims, the only course is to interpose trustees to hold the wife's funds. This is done by a conveyance of the funds by the wife, with her husband's consent, either in the marriage-contract, or in a separate deed in favour of trustees. The purposes of the trust which the wife creates usually are to pay the free yearly income to the spouses, and the longest liver of them, during their joint lives, and the life of the longest liver; or (if the income is to be secured for the separate use of the wife herself) to pay the same to her during her life, excluding the husband's *jus mariti* and right of administration; declaring the income payable to her to be alimentary, and not capable of being burdened or assigned by her by way of anticipation. After her death the income will be payable to her husband during his life, in case he shall survive her; and the fee or capital will be payable to the children of

IN TRUST.

¹ This view is illustrated by the case of *M'Donald*, 29th Jan. 1793, M. 5848.

the marriage, if sons, at their majority, and if daughters, at majority or WIFE'S ESTATE. marriage, and after the death of the wife, or of the husband and wife, supposing both of them to have rights of life over the fund. In case there shall be no children, or none who shall acquire a vested right, then the fee or capital will be payable to the wife upon her husband's death, if she shall survive him, and to her heirs or assignees upon his death, or upon the termination of his right in the funds, if she shall have predeceased him.

This is a very simple trust as to its purposes, and very commonly adopted in practice for securing a lady's fortune upon her marriage. The terms of the dispositive clause will be as in the case of the trust-deed by the husband already noticed. The wife's deed should likewise contain the provisions before suggested as to the division of the capital among the children; giving the power of division, in this case, to the spouses during their joint lives, and to the survivor solely after the death of either. It should contain distinct and definite orders as to the vesting of the children's rights in the fee; the right of the issue of predeceasing children to their parents' share; and the right of accretion of surviving children, when the predeceasers leave no issue; and it should give the trustees power to expend the capital to a limited extent for the children's professional education, outfit, or advancement, before vesting,—all as in the case of the husband's trust; except that, in the wife's case, the consent required before making advances for outfit should be on the part of the parents, or survivor of them, whilst in life.

The deed will of course contain likewise all the usual and necessary powers of management. With regard to clauses of indemnity to purchasers, debtors, and others dealing with the trustees, and declaring the trustees not liable for omissions, or for each other, etc., reference is made to what has been said on the same subject in connexion with marriage-contract trusts by husbands.

When trusts are created both by the husband and wife, it will generally be found that one set of powers of management, etc., will serve for both. But it must be kept in view that there are two distinct trusts created by different parties, and having relation to different funds; and, if one set of clauses is made use of, care has to be taken to make all the powers, declarations, etc., flow from both the parties, and apply to both of the funds. And, if land is conveyed, there will not only be adequate description in the dispositive clause, but all the clauses usual in an ordinary disposition of lands.

The conveyance must also be followed by registration or infestment in favour of the trustees so far as regards land embraced in it, and otherwise completed or made effectual according as the nature of the subjects conveyed may require.

The detailed consideration of the proper trust clauses will be deferred until we are examining the testamentary trust-deed. But there are one or two points, properly connected with marriage trusts, and chiefly arising in reference to the case of the wife, to which I will now call your attention:—

SMALL SUC-
CESSIONS RE-
SERVED TO
WIFE.

1. It is usual to make the conveyance by the wife include all she has at the time of the marriage, and all that shall fall to her during the marriage; the object being, as far as possible, to protect her and her children against the improvidence or misfortunes of her husband, and to secure her property to herself for her life, and to her children after her death, and, failing children, to herself,—an object, the importance of which is now made greater than formerly by the provisions of the Moveable Succession Act of 1855, which exclude a predeceasing wife from all interest even in such property as shall have come to her husband through herself. But it is not desirable that legacies, or successions of small amount (I mean small with reference to the circumstances of the parties), shall fall under the trust. These are intended for the personal benefit of the legatee; and, probably, if it were supposed that they would fall into the hands of her trustees and be locked up, they would not be granted. It may therefore be convenient, in some cases, to except from the conveyance of estate to fall to the wife, during the marriage, sums or property devolving upon her,—the amount or value of each of which respectively,—not the value in the aggregate, but of each respectively,—shall be under a certain specified sum. In a case where there was no such exception, and where a near relative of the wife wished to leave her a legacy of considerable amount, and to give her the full use of the money free of control by her marriage trustees, the difficulty was got over by granting the legacy to the husband. In that way the legacy did not fall under the trust, because it was never the wife's property; and the testator had confidence in the husband that he would make the legacy available for the wife's benefit. But a similar course may not always meet the views of parties.

ANNUITIES.

2. It may happen that part of the wife's estate consists of a life interest or terminable annuity, or the surplus rent arising from leasehold property or the like; and, if it is the intention of the parties that such annuity or surplus rent (or as the case may be) shall be dealt with as part of the income of the parties, and annually paid over to them as life interesters by the trustees, the contract or trust-deed should contain an express declaration to that effect; otherwise I apprehend that, under a trust in the terms before suggested, the trustees would have to capitalize the annuity or surplus rent by selling it, or otherwise, and give the spouses only the interest of the capital or price realized from it, preserving the fee for the children.

WIFE'S OUTFIT.

3. When the wife is dealing with her own fortune, and the provision on her side is not granted by her father, it will often be found convenient to give the trustees directions to pay her, on her own receipt, after the marriage, a sum, not exceeding a specified amount, out of the capital of the funds. One object of this provision is to enable her to pay for her outfit from the capital of her own funds, which it may not always be convenient for her to do before her marriage, and which ought not to form a burden on her husband, or on her own future income.

There may be other objects which can best be provided for in the same WIFE'S ESTATE. way. The requisite clause will be introduced as one of the purposes of the trust which the wife creates.

4. Where a wife's means consist not of a definite and specific provision, but of the share of an estate which is unascertained, and sometimes more or less involved (it may be) in family questions, or in the settlement of partnership or other claims arising to her as in right of some relative, it may be of importance, from considerations of various character, to compromise claims, or to make concessions, for which there may be moral though not legal grounds. If possible all such matters should be settled before the marriage. But it may be impossible to accomplish a proper settlement in due time. Trustees, however, have not the same interest in regard to such questions as the wife herself, nor have they the same right which she had before her marriage, and they may be unable or disinclined to take less than the law will allow; and so, for their own security and exoneration, they may be obliged to carry into Court matters which it would be better to adjust privately, and in the way of friendly arrangement. To meet such a case as this, the wife may, in her marriage settlement, expressly reserve to herself (with or without concurrence of her husband, as may be arranged) the full power to make all such arrangements with third parties as she and her husband (if his concurrence is required) in their discretion shall think fit; and to grant all requisite discharges or other deeds without consent or concurrence of the trustees, providing always that whatever sums of money or estate shall fall to the wife, as the result of such arrangements and discharges, shall be paid directly to the marriage trustees, and not to her. She will adjust the terms of the settlement, with or without her husband's concurrence as has been agreed on. The trustees will draw the proceeds of her claim; and the clause, being merely a power, can be acted on by her or not as is found to answer best. POWER TO COMPROMISE.

5. When the wife ties up her whole means, or practically does so, there ought, as already suggested in reference to the husband's settlements made under similar circumstances, to be a special reservation to her, in case of entering into a second marriage, and having no estate besides what has been settled by the first contract, out of which to make suitable provisions to her husband and children of a second marriage, to grant reasonable and suitable provisions out of her settled estate, in favour of her husband and children of the second marriage;—the amount of the second provisions nowise extending beyond a certain specified proportion, and never exceeding the half of the settled estate. WIFE'S SECOND MARRIAGE.

It does not appear necessary to consider particularly the case of the wife having an entailed estate. As regards the power of granting provisions to her husband and children, she stands in the same position as her husband; except that, by the Aberdeen Act, she has power to provide him in a half of the free rents or value of the estate after her death, in case he shall survive her, whereas the husband has, by that Act,

power to give his wife one third only of such rent or value. But, if she is making a trust-conveyance of her estate, she ought to include in it her right to the entailed estates and rents thereof, during the subsistence of the marriage, qualifying the disposition thereof by the clauses necessary for preventing an irritancy and forfeiture of her right under the entail from being thereby incurred. These we shall consider when on the subject of entails and heritable securities over entailed estates.

I have already stated that antenuptial provisions by a husband to his wife are presumed to be granted in consideration of the marriage, not of the tocher, unless the contrary be shown by the contract. Moreover, where the wife's funds were assigned to her husband, and he, on the other hand, became bound to lay out the same, with a further sum, in favour of the children, and for securing the wife's jointure, the wife was found entitled on her husband's insolvency to have a portion of her fortune, which had been kept separate from other funds, preserved entire, so as to secure her promised provisions.¹ But in the case of Greenhill, where a wife's funds were conveyed to her husband, without any special declaration that they were to be employed in securing her provisions, she was found not entitled, notwithstanding her husband's bankruptcy, to plead retention of her own funds, until she should obtain security for her own provisions, although these provisions were wholly unimplemented.² The words of the report do not show whether the husband's provisions were expressly given in consideration of the marriage alone, or of the marriage and of the settlement made by the wife; and I confess I should like to see the point further tried.

EXCLUSION OF
jus mariti

In cases where the *jus mariti* is to be excluded, express words of exclusion should be used. But in Greenhill's case it was found that a conveyance by the wife, to herself and her husband in conjunct fee and liferent, for his liferent use allenary, and to the children of the marriage in fee, amounted to an exclusion of the *jus mariti* so far as regarded the subjects of such conveyance. And neither the assignation by the wife in her own favour, nor the qualification of the husband's rights under it, require to be intimated, in order to exclude the husband's creditors from funds belonging to the wife which have been kept separate from the husband's estate. When the right to a chose in action passes by assignation from one to another, intimation is necessary for completing the right of the new owner. But the wife's interest in her own funds, reserved by the terms of her own assignation, is not thereby transferred by her. It is already hers, and is reserved; and intimation is not necessary to perfect the reservation, or to enable her to keep the right she has. The husband's creditors are not entitled to rely on his having married without a contract, and so having acquired the Common-Law rights over his wife's fortune.³ The *jus mariti*, however, is a distinct and specific right, which is not readily held to be excluded by implication. In the

¹ Buchanan, 6th March 1787, M. 9201.

² Rollo, 28th November 1832, 11 Sh.

³ Greenhill, 24th June 1824, 3 Sh. 169.

132.

case of Cuthbertson,¹ a general declaration by the parties that their means and estate should be respectively subject wholly and entirely to their own settling and disposal, without control of each other, was found not to operate exclusion. From some other clauses in the deed, in that case, the above words seemed intended to affect only the destination and power of disposal of the parties' means at the dissolution of the marriage.

After the settlement of the wife's funds, the contract ought to contain a provision that execution shall pass thereon, during the subsistence of the marriage, at the instance of persons named, or any one of them, whom failing, at the instance of the nearest heir-male of any one of them, of the age of twenty-one years and resident in Great Britain or Ireland, for implement of the provisions granted by the husband to the wife and children. Where the contract names trustees, they are usually invested by this clause with the power of execution.

IMPLEMENT OF
CONTRACT.

In case of need, the Court will name a curator or tutor *ad litem*, to act with or for the wife or children, in carrying on suits or doing diligence during the subsistence of the marriage.² But the special clause may obviate the necessity of applying to the Court for a guardian.³

There will be a registration clause for preservation and execution in the short form; and, if the contract contains or assigns a bond and disposition in security, there will be a consent to registration in the General, or Particular, or Burgh Register of Sasines, in usual form.

When the husband gives his wife a provision by annuity out of an entailed estate, or a locality right over part of the estate, there is, in contracts executed before the Titles Acts came into operation, a precept of sasine, as to subjects not held by burgage-tenure, and a procuratory of resignation as to burgage subjects, for sasine, or resignation and sasine, to be given to the wife in liferent, of the annuity upliftable furth of the lands, or of the locality lands, as the case may be; and, when land-estate is conveyed by either or both of the parties, there will also, in such contracts, be a precept for corresponding infestment. In contracts after these Acts came into operation, there will be no precept of sasine, and no instrument of sasine, or of resignation and sasine; the registration clause will be followed by the clause of direction, where it is suitable; and the deed will be closed with an ordinary testing-clause.

The contract operates nothing, however, as a deed of settlement, unless the marriage actually follows. Before the marriage takes place either party may resile, even after having signed the contract; in which case the contract, as a settlement, will fall to the ground.

We have already seen, however, that an informal contract may be

INFORMAL
CONTRACT.

¹ Cuthbertson, 22d Nov. 1799, Hume, 206.

² M'Pherson, 18th Jan. 1773, M. 6052.

³ In the case of Smith, 11th Jan. 1866,

⁴ Macph. 279, it was held that a wife (with a curator *ad litem*) had a title to sue

her husband for payment of a provision made to her in the marriage-contract, although other persons were named in the contract at whose instance execution should pass.

validated by homologation.¹ In Falconar's case, as I formerly noticed, Lord Gillies says that to make out a case of reduction of a contract of marriage, on which marriage has followed, forgery must be averred. On the principle here suggested by Lord Gillies, a contract, professing to be signed by both parties, was reduced at the instance of the wife; it being proved that she could neither write nor read writing; that the contract had not been read over or explained to her; and that her hand had been led.²

POST-NUPTIAL
CONTRACT OF
MARRIAGE.

As far as regards form, there is no material difference between the antenuptial and the postnuptial contract. The latter proceeds on the narrative that the parties had been married without executing a contract, and were now to supply that omission. The provisions on both sides may be of the same nature, and will be expressed in nearly the same words as in the case of the antenuptial contract.

There is, however, a great difference in the legal effect of the postnuptial as contrasted with the antenuptial deed. The provisions in the antenuptial contract are regarded as in the highest degree onerous, except so far as they are exorbitant. But the provisions of the postnuptial contract, not being given in consideration of an intended marriage, but of a marriage which has already taken place, have not the same highly onerous character, and indeed may be regarded sometimes with jealousy, as possibly intended to give excessive claims to the wife or children, to the injury of third parties. But, although postnuptial provisions are in a far less degree onerous than antenuptial, still, marriage itself, and the husband's obligation to provide for his wife and children, are in themselves onerous causes; and, if the husband be solvent at the time of granting the postnuptial provisions, they will be sustained as far as moderate and rational, and suitable to his circumstances.³ It was held in one case, that the husband, when in a state of positive insolvency, might grant a postnuptial provision to his wife, to the extent of a mere subsistence.⁴ But this decision appears now to be regarded as a very doubtful precedent.⁵ And it seems, from the case of Guthrie, formerly cited,⁶ that the principle applicable to insolvency may possibly be extended to the case of a husband who had divested himself of all his means, in favour of trustees for his wife and children of his first marriage. By so divesting himself of his whole means, he is perhaps to be regarded, with reference to postnuptial provisions to his wife and children of a second marriage, as in a state equivalent to insolvency. It cannot be said, however, that any opinion to that effect has been given which can be regarded as authoritative.

The date as at which the husband's circumstances are to be inquired

¹ Wemyss, 16th Nov. 1768, M. 9174; Falconar, 14th Jan. 1830, 8 Sh. 312.

² Wilson, 24th February 1814, Hume, 923.

³ Stair, i. 9. 15; Erskine, iv. 1. 33;

Jeffrey, 24th May 1825, 4 Sh. 32; Sharp, 19th Jan. 1839, 1 D. 396.

⁴ Campbell, 26th July 1744, M. 988.

⁵ See Fraser, i. 830, and cases there cited.

⁶ Guthrie, 21st Nov. 1846, 9 D. 124.

into, in connexion with the question whether the provisions granted by him are suitable, is the date of granting the provisions.¹

The question, how far settlements by postnuptial contract are re-
vokable by one of the parties, without consent of the other, has
occasioned a good deal of discussion. On this point, it may be held as
settled, that, where provisions are granted by the parties mutually, and
such provisions are rational and equal, the mutual considerations will
render the contract onerous as between the parties, and prevent any one
of them from revoking it without consent of the other.² But where the
provision is gratuitous, or without adequate consideration with reference
to its counterpart, it is revocable, either in whole, or in so far as it ex-
ceeds what is fair and reasonable in the circumstances, as being a
donatio inter virum et uxorem. The revocation in such a case is open
equally to the husband as to the wife, and is not excluded by a declara-
tion in the deed sought to be reduced, that the same shall be subject to
revocation only by the parties mutually.³ In M'Neill's case it was said
that strong inequality was required to set aside the deed, which would
probably have stood, but for a clause of forfeiture in case of the wife's
second marriage. It was argued that that clause only might be set aside ;
but the Court held it to vitiate the whole deed, and the wife was allowed
to revoke, although she had judicially ratified the deed at the same time
that she executed it. Another question arose in M'Neill's case, in con-
nexion with the point whether the provisions made by the deed under
reduction were fair and equal, viz., if the husband's means were to be
looked to as at the date of the deed or as at the time of his death. The
deed having been reduced *in toto*, it was not found necessary to decide
that point ; and different views upon it were stated by the Lord Justice-
Clerk Boyle, and Lord Pitmilley ; the former saying the husband's means
were to be looked to as at the time of his death ; the latter, as at the date
of the deed. This question was again raised in the case of Nisbett,⁴ when
seven Judges gave an opinion that the state of the husband's affairs was to
be taken as at the date of the deed ; but still the point was not settled.

There is no doubt, therefore, that gross inequality of provision to the
wife is a ground on which revocation by her is allowed. What degree
of inequality will be sufficient to authorize revocation is always a ques-
tion of circumstances. This point is discussed in a note by Lord New-
ton, in M'Neill's case. But, where the postnuptial contract has been
preceded by an antenuptial contract, the antenuptial contract is held to
satisfy the onerous obligations of the parties, in respect of the marriage ;
and gratuitous alterations on the antenuptial provisions made by the
postnuptial deed, whether in the way of restriction or extension, will be
regarded as donations, and therefore revocable.⁵

¹ Jeffrey's and Sharp's cases.

² Hepburn, 6th June 1814, 2 Dow's App. 342.

³ M'Neill, 8th Dec. 1829, 8 Sh. 210.

⁴ Nisbett, 24th Feb. 1835, 13 Sh. 517.

⁵ Erskine, i. 6. 30 ; Jardine, 17th June 1830, 8 Sh. 937 ; see also M'Lachlan, 6th July 1839, 1 D. 1177.

As regards the children, it is settled that no postnuptial contract or other postnuptial deed, to which they are not parties, can deprive them of their right of legitim. At the same time, the provisions in their favour will be held irrevocable, so as to authorize their claiming the same, when the deeds granted authorize the presumption that they were intended to be irrevocable. Thus, where there was a *de præsenti* conveyance, *inter vivos*, to trustees, of the lands and moveable property belonging to the granter at its date,—followed by infestment in the lands in favour of the trustees, who were authorized, *inter alia*, to apply the trust funds in the maintenance and education of the granter's children, during their father's lifetime,—the deed was held irrevocable.¹ And a *de præsenti* conveyance to trustees, for the spouses in liferent, and children born and to be born in fee, followed by infestment, was also held irrevocable.² But the provisions to children by postnuptial contract are unquestionably gratuitous, and, if their father was insolvent at the time of granting them, they are reducible at the instance of his creditors. If, however, he was then solvent, the provisions are good, so far as they are suitable in amount.³ But, if the amount is payable only after the father's death, the children are not creditors any more in the case of the postnuptial than of antenuptial provisions.⁴

CHAPTER II.

BONDS OF PROVISION.

THERE are several points of importance connected with bonds of provision by a husband to his wife, or a father to his children, to which it is proper here to direct your attention. As regards their general form and technicalities, there is no peculiarity distinguishing them from the bonds or obligations by husbands and fathers to their wives and children embodied in the marriage-contract, and they may be granted directly in favour of the parties, or to trustees for their behoof, just as in the case of that contract.

TO WIFE.

In the case of a bond to a wife, to whom a provision has already been granted, the principal point to be kept in view by conveyancers is that it should be expressly declared whether the bond is intended as an addition to, or to be inclusive of, the former provision. The intention of the granter will form the rule of construction; but where the bond is silent on the above point, and the new and old are provisions *ejusdem nature*, the maxim '*debitor non presumitur donare*' will come into opera-

¹ *Smittion*, 16th Dec. 1839, 2 D. 225.

² *Turnbull*, 15th April 1825, 1 Wil. & Sh.-App. 80, reversing the judgment of the Court of Session, 12th Nov. 1822, 2 Sh. 1.

³ *Bell's Comm.* i. 642; and *Jeffrey's case*, before cited.

⁴ *Geddes*, 5th July 1836, 14 Sh. 1084.

tion, and the new provision will be held not as an addition to the old; but where the old provision was of a sum of money in fee, and the new provision was the liferent of a house,—and where, moreover, the new deed bore expressly to be for love and favour,—the new provision was held to be additional.¹ The bond should also expressly bear whether it is in lieu, or inclusive, of the wife's legal claims of *terce* and *jus relictæ*.

In the case of bonds of provision to children, the intention of the parent is still the rule for the construction. Erskine says² that the bond will be understood to give an addition, and not to be in satisfaction of a former provision; and Professor Menzies adopts that view, referring, in support of it, to a case where a legacy of £4000 to children was held not to include their provision of £2000 under a previous marriage-contract.³ The report says, 'The judges held that the maxim *debitor non presumitur donare* did not apply, as the provisions and legacy were 'in their nature entirely different; that the father had shown plain indications of what was his intention,' etc. But the presumption applicable to additional provisions to children is likewise capable of being overcome by evidence of contrary intention. This holds particularly where the first obligation is irrevocable. It is then, as regards the father at least, a debt. Accordingly, a special provision by a father in favour of his daughter, in her marriage-contract, was presumed to be in satisfaction of his obligation in her favour (as one of his children) in his own marriage-contract.⁴ And a provision by a father to his daughter, in her marriage-contract, was held to be in satisfaction of a debt due by him to her, through his uplifting a legacy bequeathed to her whilst in minority.⁵ Again, where a father, by his contract of marriage, had become bound to provide and secure to his children a certain sum in satisfaction of their legitim; and when, some years afterwards, on the narrative that his children were yet unprovided for, he granted them a bond of provision for a somewhat larger sum, with a fresh declaration that the same was in full of legitim, the Court held the provision by the bond as coming in lieu of that by the marriage-contract.⁶

The case is often much more difficult as relative to voluntary or gratuitous provisions. On the one hand, we have the case of Grant,⁷ where a father, by a holograph deed of settlement, made a provision of £2000 for his daughter, to be set aside for her, and to be vested for her behoof, and to continue so vested even after her marriage, if such should ever happen, so that the principal sum should form a provision for her and her family. The daughter was married in the following year, when her

¹ Fenton, 23d Jan. 1673, M. 11,491.

² Erskine, iii. 3. 93.

³ Menzies, p. 458; Clark, 16th May 1823, 2 Sh. 313.

⁴ Mathieson, 20th Nov. 1766, M. 11,453;

Kippen's Trustees, 3d July 1856, 18 D. 1137.

⁵ Robertson, 27th November 1685, M. 9619.

⁶ Wauchope, 22d Dec. 1752, M. 4404.

⁷ Grant, 19th Nov. 1840, 3 D. 89.

father became a party to her marriage-contract, and provided the exact sum contained in the holograph settlement to his daughter and her husband and the survivor of them in liferent, for liferent use allanarly, and the children of their marriage in fee, declaring the same in full of legitim, executry, and all that they could claim through his decease. His goodwill, you will observe, was not excepted. The Court held that, according to the true construction of the marriage-contract, the provision thereby secured was in satisfaction and implement of the provision previously made in the settlement.

We have likewise on the same side the case of Nimmo,¹ in the special circumstances of which a provision of £1000 made to a daughter in her father's deed of settlement, by which the like provision was made for each of her sisters, was held not exigible in addition to an equal sum previously provided by him to his daughter in her marriage-contract. Whether 'goodwill' was expressly excepted or not does not appear, and probably it was not a point of essential importance to the case.

On the other hand, the case of Kippen's Trustees, already referred to, requires attention: as to this point it was affirmed.² There, a provision of £5000 was made by a father, in the marriage-contract of a daughter, in favour of trustees for her in alimentary liferent, and for her children in fee; whom failing, to return to the father and his heirs. This provision was held, in accordance with the opinions of the majority of the whole Court, not to extinguish a provision of £4000 previously made by the father's trust-settlement in favour of the same daughter in liferent, for her liferent use allanarly, and her issue in fee, with power to her, in case of leaving no issue, to dispose of the £4000 as she should judge proper; but, failing disposal by her, the provision of £4000 was to revert to the father's estate. This, like the other cases, is very special. The Court were much divided. Five of the Judges were of opinion that the marriage-contract provision was in satisfaction of all former provisions, including the provision made by the trust-settlement. And Lord Cranworth, one of the three Judges who heard the case in the House of Lords, concurred with that minority.

We have another very special case, in which the presumption in favour of additional provisions was held not to take place. Under an entail, a large sum had accumulated during the minority of the first heir, for the express purpose of creating a fund out of which to grant provisions to his younger children. He granted provisions to his own younger children expressly out of the fund. He granted provisions also to the younger children of his son and grandson, but as to them made no mention of the fund; and, on the principle of *debitor non presumitur donare*, it was held that these last were nevertheless granted out of the fund, and not out of his general estate.³

¹ Nimmo, 29th June 1841, 3 D. 1109.

² Earl of Wemyss, 23d November 1810,

³ Kippen's Trustees, 21st May 1858, F. C.

3 Macq. 203.

But as regards provisions to children, as well as provisions to wives, Conveyancers should be careful to exclude all doubt regarding the grantor's intention, by declaring whether they are meant to be over and above, or to include prior provisions or debt, and likewise the legal claims of *terce*, *jus relictæ*, and legitim. There was no declaration on that subject in the marriage-contract which was immediately before the Court in Kippen's case; and the father having, in the marriage-contracts of two elder daughters, declared the provisions thereby granted to be in full of all they could claim, it was naturally asked why the same clause should not have been in the contract of the third daughter, if the like exclusion was to take place in her case. It happened that a different Conveyancer had prepared the third contract; and, in any similar case, a professional adviser ought to inquire specially whether the terms of the contract he is to frame are to be similar to those of the contracts executed on prior marriages, if there have been any in the family, and to see the prior contracts. He ought also, in all cases of granting provisions to children by their marriage-contracts, to ascertain whether there are testamentary deeds previously granted by the father, requiring to be modified or altered with reference to his children's marriage-provision, and, if necessary, to have a codicil to the testamentary deed executed by the father at the same time that he signs the marriage-contract. These suggestions arise on the perusal of the cases,—particularly Kippen's; and the case of Lord Breadalbane's Trustees, formerly cited, will further naturally suggest that when one of the members of a family, entitled to legitim, is to enter into a marriage-settlement in the English form, it should, if possible, be seen that the provision granted by the father on the occasion of the marriage is declared in full of the legitim, or of conventional provisions previously granted, unless it is intended to be over and above.

There is another case in which special care is required, if it is intended that the new provision shall exclude the right of a child to legitim, or to an irrevocable conventional provision previously granted,—viz., when the new provision on account of the child is granted to him or her in *liferent* only, and to his or her children,—that is, the grantor's grandchildren,—in fee. In these cases, a declaration merely that the new provision shall exclude the legitim, or former provision, may not answer the grantor's purpose; because the legitim, or former provision, belongs to his child only; and, the child being only *liferenter* of the new provision, the declaration will operate the forfeiture of the child's *liferent* right in the new provision, and no more, supposing the child to claim the legitim, or former provision. In such case, the fee of the new provision would be claimable by the grantor's grandchildren, notwithstanding the claim of legitim, or former provision, on the part of the grantor's immediate child.¹ When, therefore, it is intended that a child's legitim, or former irrevocable provision, shall be excluded by a

¹ Ewan, 10th July 1828, 6 Sh. 1125; Fisher, 24th Nov. 1831, 10 Sh. 55.

new provision granted to such child in liferent, and his or her children in fee, it is necessary to declare not only that the new provision is in lieu of the legitim, or former provision, but that the fee of the new provision shall not be exigible by the granter's grandchildren until they produce a valid discharge of their parent's right of legitim, or former provision, and that the new provision as to both liferent and fee shall be absolutely null, in case the claim of legitim, or former provision, is made.

TERM OF
PAYMENT.

The term of payment of the provision should be distinctly pointed out in the bond, which should also declare at what time the provision is to become vested, and should give the issue of a child, dying before vesting has taken place, express right to their parent's share. It need hardly be repeated that the term of payment should never be earlier in date than that of vesting. When the term of payment is a day which may or may not arrive,—for example, the day when the child will attain majority, if he lives,—the maxim '*dies incertus pro conditione habetur*' comes into operation. The arrival of the day specified is essential to the existence of a claim under the deed. It was so held even where the provision was by antenuptial contract, and was payable, and to bear interest, when the child attained majority, although the father should have been then alive. The child was, no doubt, a creditor, but only a contingent creditor, before attaining majority. He died before majority; and the provision was held to lapse.¹ And even though a day certain is named, yet if it be so connected with a contingency as to be merely expletive, and if the intention apparently is to pay only on the contingency happening, the bond will be held not due if the contingency does not happen. Thus, where a grandfather gratuitously bound himself to aliment his grandson in his own family, 'until he should attain the age of sixteen years complete, which would happen on 7th May 1747, and to pay him at Whitsunday 1747, which would be the first term after his attaining to the age foresaid, the sum of,' etc., the child having died when three years of age, the provision was held not exigible.² But if the term of payment be certain, and without contingency, though postponed or distant, the bond, if delivered, constitutes a good claim, notwithstanding the death of the grantee before the term of payment comes.³ In Campbell's case the term of payment was five years after the date of the bond, but clear of all contingency or condition.

The provision, however, if payable at the granter's decease, and revocable, is vacated by the predecease of the grantee. The provision is intended for the support of the grantee, and it is therefore an implied condition that he shall survive.⁴

But again, if the grantee leaves children, the condition '*si sine liberis decesserit*' comes into operation, and the provision will be payable to such

¹ Grindlay, 1st July 1814, F. C.

² Bells, 1st Feb. 1749, M. 6332.

³ Campbell, 7th Dec. 1717, M. 6342.

⁴ Gordon, 17th Nov. 1757, M. 6343.

children, notwithstanding the death of the grantee before the granter.¹ If, however, there are no children, the provision lapses by the predecease of the grantee, even if the deed bears to be in favour of his heirs, executors, or assignees.² The reason is that bonds of provision are granted in implement of the parent's natural obligation to support the child, and, if that obligation ceases by the predecease of the child, the bond falls. In such cases, the destination in favour of heirs and assignees has not the effect of excluding the general presumption. It is held to mean no more than that the provision shall fall to the child's heirs and assignees, if it shall in the first place vest in the child. In a case where no term of payment was expressed, the intention of the parties as to that point was sought for in the structure of the deed and nature of the arrangement; and the provision was held payable at the granter's death, not at the date of the deed.³

In bonds of provision to children, it is not uncommon to substitute SUBSTITUTIONS. one child to another; or, when granting a provision to several children, to make the right or prospective claim of any one deceasing accresce to the survivors. And it is necessary to consider the effect of substitutions and declarations of the above description.

In the case of legacies, you will recollect that, in general, the substitution of one legatee to another does not give the substitute the right of succession to the legatee or institute, in case the institute shall survive the testator. It gives the substitute right only in case of the institute predeceasing the testator. But in provisions to children the rule is different. In these, simple substitutions, though they can be terminated or altered by the institute gratuitously, will receive effect if not so terminated or altered, subject always to the condition '*si sine liberis decesserit*,' which will carry the provision to the children of the institute in preference to the substitutes.⁴ And the substitution of two children to each other operates more than a mere destination. Where a destination was to A. and B., 'my only surviving daughters, equally between them; and, failing either of them by decease, without heirs of their bodies, or conveyance in a contract of marriage, to the survivor of them,' this destination prevented the predeceasing daughter from disappointing the survivor, except by the specified mode of a conveyance in a contract of marriage. The surviving daughter was accordingly preferred to the gratuitous assignee of the predeceaser.⁵

The same effect is allowed to a clause of return contained in a bond CLAUSE OF
RETURN. of provision; that is, a clause stipulating that, upon the failure of the grantee and his descendants, the obligation shall cease and become void, or the sum thereby due, if paid, shall revert and be repaid to the granter. Such a clause in a bond of provision cannot be gratuitously disappointed. On this principle, a bond being granted to A. and the heirs of her body;

¹ Wood, 26th June 1789, M. 13,043.

⁴ Rougheads, 14th Jan. 1794, M. 6403.

² Russel, 10th March 1769, M. 6372.

⁵ Macreadie, 15th November 1752, M.

³ Berry, 24th June 1836, 14 Sh. 1008. 4402.

whom failing, the obligation was to be at an end ; and, in the same event, the sum, if previously paid up, was to return to the grantor ;—the grantor, on being required to make payment to a gratuitous assignee before the contingency on which the return depended had happened, was found entitled to a discharge from both cedent and assignee, with an express stipulation for repayment, in the event specified in the bond.¹ But, even when there is a clause of return, the bond can be assigned for onerous causes. And the grantee himself can demand payment on simple discharge, and obligation without security for repayment, unless he be *vergens ad inopiam*, in which case he must find security to make good the return.² If, however, the bond be for an additional provision, and wholly gratuitous in its character, the Court will order caution to be found before payment, although the grantee be perfectly solvent ; because such bond is a simple gift, the conditions annexed to which must have their full effect.³

**PREDECEASE
OF GRANTEE.**

As already mentioned, when there is no substitution, the death of the grantee before the grantor evacuates a bond not payable till the grantor's death. But where there is, in terms, a substitution, the share of one predeceasing does not fall by his death. It devolves on the substitute as conditional institute.⁴ This view is illustrated in the cases of Dunlop⁵ and Broomfield,⁶ which last case suggests a special caution in the preparation of obligations for provisions to children. A father became bound to pay to his children *nascituri* £5000 if one ; £7500 if two ; and £10,000 if three or more. The provisions were not to be payable till after his death, and the majority or marriage of the children. But it was declared that, in case any child should die before his provision should be paid or payable, the same should belong to the surviving children. Three children were born, of whom two died in infancy ; and it was held that, by the words of the deed, it was not necessary that the children should acquire a vested right in the provisions in order to make the shares intended for the children who died fall to the survivor as a substitute ; but that the survivor (a daughter) was conditional institute ; the condition attached to her right being the decease of the other children before acquiring a vested right ; and that therefore the sole surviving child was entitled to the whole £10,000 intended for three or more children.

In granting such provisions, therefore, a proper substitution should be created, and so serious a miscarriage as the above prevented ; the substitution operating so that no right shall devolve upon a surviving child, unless after vesting shall have taken place in the predeceaser ; in other words, that the father shall not be bound to pay one child more than the provision intended in the case of one child, and correspond-

¹ Johnstone, 22d June 1824, 3 Sh. 163.

² Beatson, 30th June 1747, M. 4345.

³ Johnston, 11th June 1740, M. 4344.

⁴ Smith's case, above cited ; Binning, 15th Dec. 1759, M. 6337.

⁵ Dunlop, 2d June 1812, F. C.

⁶ Broomfield, 24th Nov. 1835, 14 Sh. 51.

ingly in the case of two or more. This may be done by making the obligation for the provisions run not simply in favour of the child or children born of the marriage, or the child or children named, but thus :—
'To pay to such of the child or children of the marriage, or to such of the child or children named' (as the case may be) 'as shall be alive at the death of the longest liver of myself and my said wife,' or 'as shall attain majority or be married' (or whatever may be the condition applicable to the particular case), 'the respective sums following, in the several events after specified, viz., if there shall be only one such child, £ ; if there shall be two such children, £ ;' and so forth. By these or equivalent expressions, the obligation will be regulated not by the number of the children born, but, as it ought to be, by the number who shall acquire a vested right. The substitution of one to another may follow the above clause in the usual terms. When the obligation is expressed as above, such substitution will come into operation only after the provisions have vested, and will not operate as a conditional institution.

TITLE III.

TESTAMENTARY WRITINGS.

CHAPTER I.

WE now enter on the consideration of strictly testamentary writings, a term which I use in a broad sense, and as including not merely proper testaments, or deeds relating exclusively to the disposal of the moveable or personal estate, but likewise all deeds granted *mortis causâ*, with reference either to heritable estate alone, or to estate both heritable and moveable.

INTESTATE
SUCCESSION
AMONG COLLA-
TERALS AND
ASCENDANTS.

Having already stated the rights of children, and of the surviving husband and wife, in both the heritable and moveable estate, when the legal rights of legitim, and of terce and courtesy, are not excluded, and when the proprietor dies intestate,¹ I will here notice briefly the legal rules of succession among collateral relations, or ascendants, in cases of intestacy.

(1.) The estate, heritable and moveable, of an only child dying without issue, falls to the surviving father; failing whom by predecease, the heritable estate, if consisting of proper heritage, will fall to such only child's heir in heritage; and if of conquest then to his heir in conquest; according to the rules to be stated when we enter on the subject of succession to land, or heritable property generally. Of the moveable estate in such case, one-third falls to the child's mother, if surviving; in which case the remaining two-thirds, and, in case of the mother's predecease, the whole, will fall to the child's nearest-of-kin,—that is, uncles and aunts by the father's side; whom all failing, their descendants; and then ascendants, etc., in lines which it is unnecessary here to trace. There is, however, no representation in this case in reference to moveable estate; because the deceased is supposed to have been an only child without brother or sister. A surviving uncle or aunt, therefore, will exclude the issue of a predeceasing uncle or aunt, when the succession is moveable only; and so forth, in the case of degrees of more distant relationship; the nearest in degree always excluding the children of those in the same degree who have predeceased the intestate, from all

¹ See *ante*, p. 792, *et seq.*

share in the moveable estate. Such children are one step further off from the deceased than their parents, and so (not being among the nearest-of-kin) do not take, as their parents would have done, had they survived. This rule of the Common Law was not altered by the Moveable Succession Act of 1855.¹

(2.) When, in place of an only child, as above, there are several children by the same father, the immediate younger brother, or his descendants, will take the proper heritage; the immediate elder brother, or his descendants, the conquest. With regard to moveables, the surviving father will take a half; whom failing, the surviving mother will take a third; and the remainder, being one-half or two-thirds, as the case may be,—or, if there is neither father nor mother, the whole estate,—will fall to the deceased's brothers and sisters; the issue of any brother or sister who may have predeceased having right to their parent's share on the principle of representation, introduced as to the descendants of the brothers and sisters of the deceased by the Act of 1855.

(3.) If there is no brother or sister by the same father, but one or more brothers or sisters, or the descendants of a brother or sister, by the same mother, then, whilst the heritable estate will go exclusively to the father's relations, just as if there were no relations by the mother, the moveable estate will go (failing the father and mother of the deceased)—one-half to the brothers and sisters uterine; and the children of any of them who shall have predeceased will take the share which would have fallen to their parent, if he or she had survived;—the other half will fall to the deceased's next-of-kin, by his father, according to the rules already explained.

But (4.) any person who is entitled as one of the next-of-kin, or as the representative of one of the next-of-kin, to a share of the moveables, and who is also entitled as heir to the heritable estate, will be excluded from the moveable estate, other than what are called heirship moveables, if he takes the heritable estate. It is, however, in his option, as formerly explained, either to take the heritable, and give up his right to a share of the moveable estate, or to collate the heritable with the moveable estate, and require the whole to be thrown into a common fund; in which case the whole is subject to the same rules of distribution as if there had been moveable estate only. Collation, however, viewed as a privilege, can be insisted in by the heir in heritable estate only, or his representatives; the law desiring that he should not be worse off than the other relatives in the same degree. But the obligation to collate is not confined to cases where the heir in heritage, and the heirs in moveables, are heir-at-law and next-of-kin of the deceased. Thus where a testator left the residue of her estate to A. B. and his heirs and successors, and, A. B. having predeceased the testator, the estate fell to his heirs and successors,—the eldest son, claiming the heritable estate as being heir of his father, was held not entitled to a share in the moveables as being one of his father's next-of-kin, without collating the heritage, COLLATION.

¹ 18 & 19 Vict. c. 23.

although neither he nor the other children were the next-of-kin of the party by whom the property was destined, and were only called to it descriptively as the heirs and successors of their own father.¹ Collation does not arise in cases of absolute intestacy only; for an heir of entail must collate his interest in the entailed estate to which he succeeds under a special destination, in order to his being entitled to a share of the moveable estate.² If the heir does not think fit to collate, there is no corresponding privilege allowed by law in favour of the other relatives, however large may be the heritable estate, and however unequal may be the distribution of the estate as a whole.

The deeds to be examined in connexion with this subject are :—

1. The proper Testament.
 2. The General Disposition and Settlement;
 3. The same deed, having a special assignation, or disposition, incorporated with it.
 4. The Trust-Disposition and Settlement, with or without relative deed or letter of instructions; and
- Lastly*, Codicils, or additions to existing deeds.

The deed of entail, although frequently a *mortis causâ* deed, is very peculiar in its structure, purposes, and operation; and the principles of construction applied to it are very special. I propose, therefore, to take up the consideration of that deed after disposing of other testamentary writings, but as an entirely separate subject.

The deeds we are about to examine have all for their object the expression of the testator's will or purpose, concerning the disposal of the whole or some part of his estate after his death. But, whilst it may be said that, in all matters properly belonging to the mere expression of will or purpose regarding disposal, the same rules of construction are applied to all the deeds (entails excepted, of which I am not now speaking, and as to which a totally different rule of construction is applied), there is a remarkable distinction, as regards technicalities, between those deeds which contain or embrace heritable estate, and those which relate exclusively to moveable estate; or, to speak more emphatically, the same deed is construed differently, according as it relates to heritable estate and to moveables respectively.

MOVEABLES.

As regards the moveable estate, no particular form of words nor any technical term is absolutely required, in order that the testament or conveyance, or the grant of a legacy, may be effectual. What is required is a distinct expression, in the deed or deeds, of the concluded will or purpose of the testator, regarding the disposal of his estate, or some portion thereof, or the grant or bequest of the legacy; and it may be assumed that, when there is such expression in the deed or deeds, the Court will give effect to it.

HERITAGE.

When proper land estate is to be conveyed, the deed or deeds must

¹ Blair, 14th Nov. 1849, 12 D. 97.

² Lord Justice-Clerk Hope in Blair's case.

equally contain an expression of the concluded will and purpose of the testator; but they must also contain the proper dispositive words. Lord President Blair says,¹ 'To make a valid settlement of heritage, 'nothing more is necessary than dispositive words, expressing the will 'of the granter.' But between the cases of deeds applicable to heritable and moveable estate respectively there is this essential distinction, that in the former the technicalities applicable to the conveyance of heritable estate, by the Law of Scotland, must be observed. This is a doctrine to which there is no exception. The same strictness is not required as regards directions for the disposal of heritable estate, after it is once validly conveyed. A valid conveyance being granted, the rules of construction of deeds affecting or burdening the disponee, or declaring the purposes to which the heritable estate is to be applied, are very much the same as regards both heritable and moveable estate. But, in framing the conveyance itself, the technicalities as to heritable estate must be observed, or the whole will fall to the ground. We now proceed to the examination of the Testament.

A testament, in the strict interpretation of the term, consists of the nomination of an executor; that is, a person to ingather the granter's moveable estate after his decease, for the benefit of all concerned therein. A probative writing in the following terms would be a good testament to the above effect,—'I hereby name A. B. to be my executor.' And even where the maker of the testament (the testator) does no more than name an executor, without giving any directions for the disposal of his moveable estate, the writing containing the nomination is a proper testament. In such cases, the executor is a mere trustee, whose duties are to realize the moveable estate, and to account for it, and pay over the residue, after satisfying debts and necessary expenses, to the next-of-kin or others entitled to the estate by law. And although there shall be a widow having right to *jus relictæ* out of the estate, and children having right to legitim, the executor will levy the whole estate, without deduction or exception in respect of the *jus relictæ* and legitim. Having done so, he will account to the widow and children for their shares, and dispose of the residue among the next-of-kin.

By our old law, executors-nominate, that is, named by the testator in a proper testament, when strangers to the testator, not only levied but appropriated to themselves the whole estate, as being in effect universal legataries. But by the Act 1617, cap. 14, their doing so was declared to be against law, conscience, and equity; and such executors were restricted to the third of the dead's part undisposed of by the deceased. They had no claim in competition with legatees or others claiming under grants or orders by the deceased as to the disposal of his executry estate. Nor did their claim arise when the testator executed not merely a proper testament naming them to be executors, but also a general disposition of his whole moveable estate; and their claim was

¹ Glover, 7th Dec. 1810, F. C.

excluded, although the general disposition was only in trust, and by the death of a legatee or otherwise the residue of the estate became payable by the trustee to the next-of-kin of the testator.¹ Now by the Moveable Succession Act of 1855, sect. 8, the right to the undisposed-of third is abolished, and it is declared that executors-nominate shall, as such, have no right to any part of the estate. The office is therefore now simply one of gratuitous trusteeship.

But, although the mere nomination of an executor makes a proper testament, it is very unusual to meet with a testament in that form. It is much more usual to find, in the deed which names the executor, instructions for payment of the testator's debts and legacies, and for the disposal of the residue of his estate, as in the *Style Book*;² and very often the deed will name the executor himself to be universal or residuary legatee, under burden of the payment of debts and legacies. The testament, in this last form, consists of the nomination of the favoured party to be executor 'and universal legatary;' to which may be added a clause, leaving and bequeathing to him comprehensively the whole moveable and personal estate and effects then belonging to the testator, or which shall belong to him at the time of his death, with the writings and vouchers thereof; under burden of paying the testator's deathbed and funeral expenses, and debts, and all legacies bequeathed or to be bequeathed by the testator, by the testament, or by any codicil or addition thereto, or other writing expressive of the testator's will, to be executed at any time of his life, or even on deathbed. In the case under consideration, the executor is to be also residuary legatee; and the testament will end with the order to pay the testator's debts and legacies,—the general conveyance in such case giving the universal legatee right to the residue, without any special order to that effect. But, if the residue is to go to a third party, the order to pay debts and legacies must be followed by a special order upon the executor to pay or make over the residue to such party as soon as the other purposes are fulfilled.

DISPOSITION
AND SETTLE-
MENT.

Another common form of testamentary conveyance of moveable estate is a *Disposition and Settlement*, bearing to be granted (as, in general, the proper testament also will express), 'For the settlement of my affairs in the event of my death, and for the favour and regard I bear to the persons after named,' and containing a dispositive clause, by which the testator gives, grants, assigns, and disposes to the favoured individual, and his heirs, executors, or assignees whomsoever, his whole moveable and personal estate and effects (as in the last case), with the writs and vouchers thereof; but under the burden of paying deathbed and funeral expenses, debts, and legacies (as in the last case); and here, as in that case, there will be either no order as to the residue, or an order to pay and make over the same to a third party, according as the general donee is to be residuary legatee or not.

The disposition and settlement will then name the general donee

¹ Lowndes, 18th July 1862, 24 D. 1391. ² Juridical Styles, ii. 432.

to be executor, and will conclude with reservation of the testator's life-
 rent right, with power to dispose of the estate at pleasure, for onerous
 causes or gratuitously, power to revoke or alter at pleasure, and clause
 dispensing with delivery. These clauses, though often introduced in the
 proper testament, are not strictly appropriate to it ; as the nomination of
 executors, and the bequest of legacies and residue, are all testamentary
 grants, in form as well as in substance. The disposition and settlement
 is, in form, a *de præsenti* conveyance. Being strictly testamentary, and
 remaining undelivered till the testator's death, it also is revocable at the
 pleasure of the granter ; but these clauses should not be omitted in it.
 The testament, as well as the disposition and settlement of moveables,
 will conclude with the short clause of registration for preservation, and
 testing-clause.

DISPOSITION
AND SETTLE-
MENT.

Such deeds frequently profess to be granted in order to prevent disputes about the testator's succession in the event of his death. That clause, however, does not prevent disputes ; and, as it reads awkwardly when disputes do arise, it may well be omitted. The proper way to prevent disputes is to make a valid and intelligible deed.

I will refer by-and-bye to the meaning and import of different terms employed in testaments to describe the nature and extent of the property thereby conveyed. For the present, I go on with the consideration of the forms of testaments in other respects.

I have noticed that the special province of the testament is to name the executor ; but such nomination is not essential to render a testamentary conveyance of the moveable estate or the grant of a legacy good and available. And the testament is not invalidated as a settlement of the testator's moveable estate by the non-acceptance of the executor named, nor by the testator deleting the executor's name without making a new appointment of executor.¹ In such cases the Commissary Court of the deceased's domicile, if in Scotland, or the Commissary Court of Edinburgh, if the domicile of the deceased was not in Scotland, will appoint an executor to carry out the purposes of the deed. But where one of several executors-nominate, and who is declared a *sine quo non*, declines to accept, the others can act without him, if from the terms and conception of the deed it does not appear to have been the intention of the truster that his non-acceptance should dissolve the trust-management.²

Moreover, the term 'executor' is not a *vox signata*, which must necessarily be used in the clause of appointment. Thus, when the testator left a legacy of £200 to her nephew, 'with power to see this will executed,' the Court dealt with this as an appointment of the nephew to be executor.³ But where the executor is to have a mere trusteeship, or office, care must be taken to avoid any expression indicative of a right of a beneficial description. Where the testator, after naming the executor,

¹ Kempa, 2d March 1802, M. 16,949.

² Forbes, 2d Feb. 1808, M. App. *Solidum et pro rata*, No. 3.

³ Dundas, 27th Jan. 1837, 15 Sh. 427.

added, 'I hereby debar and seclude all others from any right or interest in my said executry,' these words were held equivalent to the appointment of the executor as universal legatary, and gave the executor the whole estate.¹

GENERAL
DISPOSITION
AND SETTLE-
MENT.

The General Disposition and Settlement bears a considerable resemblance in its form and arrangement to the disposition and settlement of the moveable estate, which we have just examined; but whilst the disposition of the moveable estate, in the dispositive clause, may or may not contain the word 'dispone,' without injury to its efficacy, and whilst testamentary deeds applicable to moveable estate only may or may not contain *de præsenti* conveyances, it is essential in conveying heritable estate, and as much so in a testamentary conveyance as in a deed *inter vivos*, that words of *de præsenti* conveyance shall be employed. A *mortis causâ* conveyance of heritable estate is, in fact, by a sort of legal fiction, a conveyance *inter vivos*.

WORDS OF *de*
præsenti CON-
VEYANCE.

The use of words of *de præsenti* conveyance is a matter of absolute necessity. Failure as to that point would render a testamentary disposition inept as a conveyance, in so far as regards heritable estate, however explicit and distinct might be the expression of will and purpose contained in it. It cannot be stated as a decided point that the use of the word 'dispone' is essential, but it would unquestionably be dangerous, and a gross professional blunder, to omit that word in the dispositive clause. Thus, when the testator 'left and bequeathed his land estates' in certain terms, but did not 'dispone' them, the Court, 'in respect the deed is in the form of a latter will and testament, and 'leaves and bequeaths the land estates in certain terms, but contains no 'proper disposing words, nor is, in any respect, a deed *inter vivos*,' found it ineffectual to convey heritage.² It will not avail the party intended to be benefited, that the testamentary disposition is executed abroad, and according to the forms of the country where it is granted.³ Neither is it competent to accomplish the transfer of land to the party intended to be favoured by merely executing a deed whereby he is nominated to be heir of the testator.⁴ Such nomination, in order to be effectual, must be connected with, so as to form part of, a deed containing the proper *de præsenti* dispositive words. Nor is it competent to exclude the heir entitled by law or prior destination to succeed, by merely executing a deed declaring such heir excluded or disinherited.⁵ The heir can be excluded only by making a valid conveyance to some third party. But, such conveyance being granted, a clause of exclusion may, if aptly expressed, prevent the heir from succeeding in his natural order, after failure of prior heirs called by the conveyance.⁶

EXCLUSION OF
HEIR.

¹ Beizly, 1st Feb. 1739, M. 6591.

² Stewart, 15th Nov. 1803; Sandford on Heritable Succession, i. 63.

³ Crawford, 14th Jan. 1774, M. 4486.

⁴ Montgomery, 9th June 1795, Bell's Folio Cases, 203.

⁵ Stoddart, 5th Feb. 1734; Elchies, *voce* Succession, No. 1; Ross, 2d March 1779, M. 5019; affirmed 10th April 1771, 2 Paton's App. 254.

⁶ Ayton, 5th Feb. 1742, M. 14,935.

There must be a *de præsenti* disposition; and the word 'dispone' ought to be made use of. The dispositive clause may run thus: 'I give, grant, and dispone to A. B., and his heirs and assignees, all and sundry the whole estate, heritable and moveable, real and personal, now belonging to me, or that shall belong to me at the time of my death, with all right, title, and interest which I or my predecessors have or had therein, and with the writs and vouchers,' etc., as in the case of the disposition and settlement of moveable estate only. But, assuming that there is a *de præsenti* disposition, and that the word 'dispone' is employed, it is not incompetent,—on the contrary, it is the most usual case in practice,—that one and the same deed shall contain, as in the above example, both heritable and moveable estate. A *mortis causâ* deed of this description was sought to be reduced so far as regarded the heritable estate by the testator's heir-at-law, as being of the nature of a testament, because containing the appointment of an executor. But it was sustained, because, so far as regarded the heritable estate, it was nowise a testament, but a plain disposition *inter vivos*, made *in liege poustie*.¹ Neither does it alter the nature of the deed that it is called (erroneously) a testament. A *mortis causâ* disposition, described as a testament, will validly convey heritable estate, if the appropriate *de præsenti* dispositive words are used in it.² Such deed is not chargeable with any stamp duty.

GENERAL DIS-
POSITION AND
SETTLEMENT.

EXEMPTION
FROM STAMP-
DUTY.

As regards the definition or description of the estate or effects to be conveyed, the terms to be employed are of critical importance. As already mentioned, the deed must express a concluded purpose, and, in regard to heritable estate, must contain words of *de præsenti* conveyance, and ought to employ the word 'dispone.' But, assuming that these requisites are satisfied, the intention of the parties, as expressed in the deed, will form the rule of construction. We shall find that, in consequence, the same words are liable to be variously construed in different circumstances.

DESCRIPTION
OF ESTATE.

Where the whole estate is to be conveyed, the safe rule in practice is to employ words the most general and comprehensive. If there is no heritable estate, these words may be 'the whole moveable and personal estate and effects.' If there is heritable as well as moveable estate, the words may be 'the whole estate, heritable and moveable, real and personal,' with this addition in either case, 'now belonging to me, or that shall belong to me at the time of my death.' It would be equally effectual in any case to use words minutely embracing every particular of the estate; but in adopting the latter plan there is always risk of omissions, and thereby of partially defeating the testator's purpose.

In illustration of the effect allowed to the expression of a concluded purpose, and general and comprehensive terms, accompanied, in cases where the deeds are intended to embrace heritable estate, with proper dispositive words, you may be referred to the following cases:—(1.) where moveable estate only was conveyed—the case of *M'Millan*.⁴ Here a

¹ Douglas, 11th July 1733, M. 15,940.

² Lamont, 4th Dec. 1789, M. 5494.

³ 23 & 24 Vict. c. 15, s. 7.

⁴ *M'Millan*, 28th Nov. 1850, 13 D. 188.

document was written by a husband, and subscribed by him and his wife, bearing that he and his wife made 'this agreement, that the longest liver 'is to have all that remains after payment of our debts.' This document was sustained as an effectual settlement of the husband's whole free moveable property in favour of his surviving wife. And (2.) where estate both heritable and moveable was conveyed—the case of Drummond.¹ The testator here disposed 'all estate, real and personal, belonging to him;' which was held to include his whole estate of every description. Again, a disposition of 'every moveable and immoveable subject' was held to comprehend heritable estate.²

In illustration of the risk attending the plan of going into particulars in the clause describing what is conveyed, you may be referred to the case of the Earl of Fife.³ Here the conveyance of all 'moveable goods, gear, and effects,' of whatever kind and denomination, was found not to include debts contained in bond or bill, or money, or bank-notes. Again, the disposition of a house, with the whole plenishing and household furniture, and every article of all sorts and descriptions contained in it, does not comprehend money or documents of debt found in the house.⁴ In Carswell's case, the term, 'whole other moveable estate,' following a provision of furniture and corporeal moveables, was held not to include money, debts, rents, or shares of stock which belonged to the testator.

HERITABLE ESTATE.

Further, when heritable estate is to be conveyed, not only must the proper dispositive words be made use of, but, if there are not general and comprehensive words of conveyance, descriptive terms appropriate to the heritable estate actually intended to be conveyed must be employed.⁵ In Galloway's case, the Court doubted the intention of conveying a personal bond on which adjudication had followed before the date of the testament; but they were satisfied that the proper terms of conveyance of heritage 'were not used, besides that the words, "goods, gear, debts, and sums of 'money," were not sufficiently descriptive of an adjudication.' An adjudication, being a judicial disposition of lands in payment of debt, is, properly speaking, a title to lands, subject to redemption on payment of debt, and not the voucher of the debt itself. In Galloway's case there were wanting both the proper *de presenti* dispositive words applicable to heritable estate, and the terms descriptive of the heritable estate claimed as falling under the deed; and it need hardly be said that failure in either of these particulars would be equally fatal to the efficacy of the deed as a conveyance of heritable estate.⁶

Again, a disposition of 'means and effects, heritable and moveable,' was held insufficient to convey a house; such a subject not being usually

¹ Drummond, 17th July 1782, M. 2313.

² Welsh, 28th June 1809, F. C. See also Glover, 7th Dec. 1810, F. C.

³ Earl of Fife, 14th May 1795, M. 2325; affirmed 6th March 1797, 3 Paton's App. 549.

⁴ M'Nab, 30th May 1797, M. 2303. See also Carswell, 9th Feb. 1858, 20 D. 516.

⁵ Galloway, 12th Jan. 1802, M. 15,950; Stewart, 22d May 1838, 16 Sh. 1017.

⁶ Ross, 2d March 1770, M. 5019; affirmed 10th April 1771, 2 Paton's App. 254.

intended by these words in their ordinary sense.¹ There is, however, no *vox signata* applicable to the description or specification of what is to be conveyed; nor will even the same words always have the same meaning given them. In the case of Browns, the terms 'means and effects, heritable and moveable,' were held sufficient to include an adjudication for debt, the legal of which had not expired. Again, where the disposition contained proper dispositive words, and the intention of the testator was thought sufficiently evident, the same terms were held sufficient to comprehend a debt on which adjudication had been led after the date of the disposition.²

As a simple testament cannot convey lands, so neither can it be made use of to burden lands without the use of terms appropriate to the constitution of a burden thereon.³ But, as a disposition of lands can be added to a testament, so can a burden on lands be created by a clause in such a deed, if the appropriate terms are employed, and are not introduced merely as accessory to, or dependent on, the testament. And, though the heir-at-law cannot be burdened by a mere testament or disposition of moveables, yet where heritage is disposed by a *mortis causâ* deed to a stranger, the donee may be burdened with debts in a separate testament. The testament affords full evidence of the will of the disponent, that the donee should be so burdened; and that is sufficient to impose the burden in the case of a stranger donee.⁴ Even the heir-at-law can be effectually burdened by means of a testamentary or *mortis causâ* deed in his favour, if such deed embraces both heritable and moveable estate. When moveable estate only is conveyed to the heir-at-law, and the conveyance is not so framed as to create a burden on the heritable estate, the heir can keep himself free of any burdens imposed on him, as donee of the moveable estate, by declining to take the moveable estate, or in any way to avail himself of the deed. In such case he takes the heritage as heir, and is free of the burdens intended to affect him as donee of the moveable estate by the conveyance thereof. But when the deed validly embraces both heritable and moveable estate, and creates burdens on both of the nature of legacies or otherwise, the heir cannot free himself of such burdens by repudiating the conveyance, and taking the heritage as heir-at-law. He may, if he thinks fit, make up titles to the heritage in that character, and not under the testamentary or *mortis causâ* deed in his favour; but such deed, notwithstanding, is a valid exercise of his predecessor's power. It is a valid conveyance of the heritage; upon that conveyance the burdens have been imposed; and the legatees will be entitled to make good their claims against the heir, in whatever way he may take up the heritage. He cannot, by the mere form in which he makes up his title, repudiate or render nugatory a valid deed granted by his pre-

MODE OF BUR-
DENING LANDS
BY TESTAMENT.

¹ Browns, 26th Jan. 1770, M. 5440.

² Robertson, 17th June 1785, M. 15,947.

³ Govan, 28th Jan. 1812, F. C.

⁴ Davidson, 19th Feb. 1755, 5 Br. Sup. 289.

decessor.¹ And even a simple bequest of lands, made in a proper testament, may become effectual to the legatee, if the testament contains clauses in favour of the heir in such lands, and such heir accepts the benefit thereby conferred. He cannot adopt the testament as far as in his favour, and repudiate it as far as against him. He must either adopt it as a whole, and thereby become bound to make the bequest of the lands effectual to the legatee, or repudiate the testament as a whole, in which case he will take the lands as heir of the testator, and forfeit the benefit of the clauses in his favour contained in the testament.²

SPECIAL ASSIGNATION OF PARTICULAR EFFECTS.

With the proper testament or general disposition of moveable estate, there is sometimes coupled a special assignation of particular effects or of moveable debts; and sometimes the special is added to the general disposition by the subscription of a relative inventory, or list of effects, debts, etc. Clauses applicable to both of these forms of deed will be found in the Style Book.³ The object of the special assignation is to give the general disponee or executor the full right and title to the moveable debt or subject assigned, without the necessity of completing a title by confirmation, a process which is indispensable for the above purpose, when there is only a nomination of executor or general disponee, and even when both of these titles concur. The title, when there is a special assignation, is expressly declared by the Act 1690, cap. 26, to be good without confirmation; and various cases occur in practice, in which it is found convenient to have special assignations introduced in testamentary or *mortis causa* deeds. But, although confirmation is not necessary as a title when there is a special assignation, the Stamp Acts now require all the personal estate of the deceased to be specified in giving up the inventory for confirmation; and neither stamp nor succession duties are saved by the special assignation.

When special assignations are granted of moveable estate constituted by writs, such as debts due by bond or bill, the writs should be specially assigned, as well as the debts contained in them. No further alteration arises because of the special assignation; and the assignation of writs, though usual and proper, is not absolutely necessary. The assignation of debts, when it comes into operation, should be duly intimated to the debtor.

HERITABLE BONDS.

With the general disposition and settlement also, there has been frequently conjoined a special conveyance of particular lands or other heritable estate; and, until the passing of the Heritable Securities Act of 1845,⁴ there was frequently inserted also a special conveyance of heritable bonds, when the testator had money invested on such securities. A general conveyance, however, so expressed as to embrace heritable bonds, was declared, by the above Act, a sufficient warrant on

¹ Binning, 25th June 1742, Elchies, *voce* Testament, No. 7.

² Cunningham, 17th Jan. 1758, M. 617; Dundas, 14th Jan. 1829, 7 Sh. 241;

affirmed 22d Dec. 1830, 4 Wil. & Sh. App. 460.

³ Juridical Styles, ii. 436-7.

⁴ 8 & 9 Vict. c. 31.

which to make up a title to such bonds, equally as when there was a special conveyance of the bonds, though the forms applicable to the two cases are different. The special conveyance of heritable bonds has, in consequence, been given up in practice as no longer of use.

With regard to lands, a mere general disposition did not, in itself, afford to the disponee the means of at once obtaining a real right in the lands, until the Titles Acts of 1858 and 1860 came into operation, because it contained none of the executive clauses previously necessary for that purpose, viz., as to feudal lands, obligation to infeft, procuratory of resignation, and precept of sasine; and, as to burgage lands, obligation to infeft, and procuratory of resignation. If the general disponee was the testator's heir-at-law, he could obtain a real right by making up titles in that character, passing over the general disposition and settlement as a title; that is to say, not incorporating it in his title. To this no one had an interest to object, although, as in the case of the general conveyance in a marriage-contract, the general disposition and settlement would, until validly altered, remain the ruling destination of the estate, and it was desirable to have it incorporated in the titles. But the case was different when the general disponee was a stranger. There was no alternative mode in which he could make up his titles. He had no right or title, except in virtue of the general disposition; and his remedy was to found on that deed, as constituting an obligation on the heir-at-law to make up titles to the lands and grant a conveyance in his favour in implement thereof. On the ground that the general disposition created such an obligation, the disponee had to bring into Court, against the heir of the former investiture, the processes of constitution and adjudication in implement, preceded by the letters of general charge, and of special or general special charge, as already explained. By the decree of constitution, he constituted and ascertained the obligation of the heir to make up titles to the lands, and grant a disposition thereof in implement of the general disposition and settlement; and by the decree of adjudication in implement the Court adjudged the lands from the heir, and decerned and declared the same to belong to the general disponee, in implement of the general disposition and settlement, and ordained the superiors to grant to the disponee charters of the lands. This decree of adjudication accordingly formed the warrant for a charter of adjudication in implement, by the superior, of subjects held by feudal tenure, in favour of the general disponee, on which he could be infeft. As to burgage-subjects, the decree of adjudication was the warrant of an instrument of resignation and sasine in favour of the general disponee. He thus obtained a real right, in terms of the general disposition and settlement in his favour.

These proceedings were very tedious and expensive; and, as they were not required when the disposition and settlement contained a special disposition, such special disposition facilitated the completion of the disponee's title; and, even when the disponee was the heir-at-law, the

GENERAL DIS-
POSITION OF
LANDS.

special disposition was sometimes of use for enabling him to complete a title more speedily than he could do in the character of heir.

COMPLETION OF
GENERAL DIS-
PONEE'S TITLE.

Now, however, the case is materially altered, because, by the Titles Acts of 1858,¹ sect. 12, and 1860,² sect. 36, as to feudal subjects, and 1860, sect. 8, as to burgage, general disponees can obtain the equivalent to sasine or to resignation and sasine, by expeding a notarial instrument in their favour, setting forth the predecessor's title and the general disposition, in terms of the schedules (H) and (E) annexed to the Acts respectively. Upon expeding and recording such notarial instrument, the donee is in the same position as if a disposition had been executed (by the granter of the general disposition) in his favour, of the lands contained in the instrument. The importance of the special disposition, as affording means of obtaining a real right, is thus in a great measure at an end. Professor Menzies recommended the special disposition as affording a convenient mode of making provisions for the granter's wife and younger children real and preferable burdens on the estate. This can now be done by means of the general disposition and notarial instrument,—the former declaring the provisions to be such burdens in usual form; and it is very desirable, as a general rule, that, when a party is subjecting one of his children in payment of provisions to his wife and to his other children, he should declare such provisions real burdens, and give his wife and other children full security, without leaving them to demand it from the donee.

TESTATOR'S
DEBTS.

Dispositions and settlements, whether general or special, or combining both the general and special, when conveying the testator's whole estate, are usually granted under the burden of paying 'all debts due by the testator, or that shall be due by him at the time of his death;' and, through oversight probably, special dispositions, applicable only to portions of the estate, frequently contain a clause expressed in similar terms, and which, if it were construed literally, would seem intended to impose the burden of the whole of the debts on the special donee. But the clause, as above expressed, when contained in a disposition and settlement which is special only, does not necessarily operate to subject the donee, even after he has accepted the conveyance, in liability for the whole of the testator's debts. Thus, although the heir-at-law was the special donee, and the disposition and settlement contained an absolute declaration that he should, by acceptance, be bound for payment of the testator's debts and provisions, he was found liable, not universally, but only to account for the estate to the creditors of the deceased, just as if the estate had been conveyed to him expressly as a trustee for all concerned.³ The decision in this case was pronounced on the principle applicable to a case of *præceptio hæreditatis*—that is, the conveyance of heritable estate by a party during his life in favour of his presumptive heir in such estate. And even where there is a disposition by a father to his eldest son and heir, containing a conveyance of the granter's whole

¹ 21 & 22 Vict. c. 76.

² 23 & 24 Vict. c. 143.

³ Bruce, 13th Dec. 1826, 5 Sh. 119.

estate, and declaring his donee personally liable for all his debts, the donee has been found liable, not universally, but only to the extent of the value of the estate conveyed.¹ Again, where there was a general conveyance, to one class of heirs, of the testator's moveable estate, and of the debts due to him, heritable and moveable, and a subsequent special conveyance, to another class of heirs, of the same testator's land estate,—each under a general obligation to pay all the testator's just and lawful debts and legacies,—the donee of the moveable estate was found liable to pay the personal debts, without recourse against the subsequent donee of the lands.² And although the moveable estate was intestate, and there was a special conveyance of land estate alone, under the burden of paying the testator's debts, etc., the moveable estate not included therein would not be relieved of the debts properly affecting it, unless it should appear that the testator meant otherwise. The representative to whom such moveable estate fell as intestate succession would be liable to pay the personal debts.³ Upon the cases of Campbell and Russel, Lord Kilkerran observes,—‘In no cases are men so apt to be of different opinions as in those that are called *questiones voluntatis*, nor in the nature of things can they be brought within one rule. Meantime, as this particular *questio voluntatis*, whether one heir or another is intended to be ultimately liable in the debts, has generally its rise only from the conception of the burdening clause, so much may be thought to be established by the decision in these cases, that no clause, however anxiously burdening the heir or donee, is to be constructed to exclude from the relief competent to him by the operation of the law, unless either the clause be such as makes the debts real burdens, or that by apt words such relief is excluded.’

I shall refer to the other clauses in dispositions and settlements, general and special, and likewise the mode of making up the donee's titles, after examining the trust-disposition and settlement. Meantime, I may observe that whilst a testament conveys moveable estate only, yet, if it bears to contain the whole of the testator's moveable estate, it will be effectual as to the whole, wherever the estate is situated, provided it be duly executed.⁴ The Act 24 and 25 Vict. cap. 114, makes important provisions relative to the modes in which wills by British subjects, in reference to their personal estate, may be executed; but, as these have been already detailed in a former branch of this course, it is unnecessary to specify them particularly here.⁵

A disposition, however, applicable to heritable estate, though expressed as containing, or intended to convey, heritable estate wherever situated, requires to be executed according to the *lex loci rei sitæ*. A disposition

¹ Smith, 21st July 1780, M. 2322.

² Campbell, 14th Jan., 17th Feb., and July 1747, M. 5213; affirmed 1st June 1749, 1 Craigie & Stewart's App. 436.

³ Russel, 23d Jan. 1745, M. 5211.

⁴ Hog, 23d Dec. 1791, M. 4619; affirmed 7th May 1792, 3 Paton's App. 247; Durie, 30th November 1791, M. 4624.

⁵ See *ante*, pp. 85, 86.

and settlement, therefore, in the Scotch form, though conveying the testator's heritage wherever situated, will, I apprehend, convey only what is in Scotland; and, if the testator has real estate elsewhere, it is the proper and usual course to get separate or supplementary deeds as to such estate prepared by English or foreign conveyancers. We ought not to rely on our own skill in such a matter. These remarks apply equally to the case of conveyances in trust-dispositions.

I may further notice here, that when parties have special powers conferred on them by others, to bequeath, or dispoise, or to burden estate not vested in them, it is usual and proper, in their deeds of settlement, to narrate or refer to the power, and to make a bequest, or disposition, or create a burden, expressly in virtue of such power; and when the power is to *burden*, and not to bequeath or dispoise estate, I apprehend that the very act authorized must be done, and that the burden will not be created by a deed which merely bequeaths or dispoises the granter's estate. But where a testator granted power to his niece, by her will, to dispose of and convey a sum of money, that sum was held to be carried by a general disposition and settlement previously executed by her, containing a conveyance of the whole means and estate, heritable and moveable, which should belong to her at her death.¹ In a later case, trustees were directed to convert the testator's whole property into cash, and to invest the same in good heritable security, or in heritable or other property, for behoof of the testator's children in liferent, and their heirs and successors in fee; any of the children having express power to leave and bequeath, by *mortis causâ* deed, the whole, or a portion of his or her share of the fee. One of the children executed a will, leaving his whole moveable property to his widow; and this was found to give the widow her husband's share of the trust-estate, although the same was partly laid out in heritable bonds.² The general conveyance contained in a trust-disposition and settlement would appear to be entitled to the same effect as regards this matter.

TRUST-DISPOSITION
AND
SETTLEMENT.

The next deed in the series of testamentary writings which I propose to explain is the Trust-Disposition and Settlement,—a form of settlement which is made use of probably more frequently than any other, because it is more suitable than any other in its power of adaptation to a great variety of those cases which have to be provided for by *mortis causâ* deeds.

ITS OBJECTS.

When the testator has simply to make over his estate to one who is of full age, and capable of managing his own affairs, the interposition of trustees would be an incumbrance. In such cases, therefore, the testator grants a disposition to the favoured party, who becomes full proprietor on the testator's death. And, even if the donee is to be burdened with provisions to third parties, there is no need of the interposition of trustees in order to give security for these provisions, if the estate consists of lands held on irredeemable titles; as real burdens can be created by

¹ Hyalop, 11th Feb. 1834, 12 Sh. 413.

² Grierson, 3d July 1852, 14 D. 939.

the disposition, general or special, in favour of the donee. But such interposition is necessary for the security of third parties, as far as the estate does not consist of lands held on irredeemable titles. If moveable estate were simply conveyed to the donee, under burden of provisions granted to others, the parties interested would have no preferable claim over the moveable estate. They would just be common creditors of the donee, entitled to be ranked *pari passu* with his other creditors, and liable to be disappointed by the result of his misfortunes or improvidence. In regard to heritable bonds or redeemable adjudications, undoubtedly a form could be devised by which a conveyance might be effectually burdened with provisions or legacies; but this would be liable to be defeated by the payment of the debt to the testator during his lifetime. And though such payment should not take place until after the testator's death, whereby the arrangements made by him for giving security for the provisions or legacies would come into operation, these arrangements would necessarily be very clumsy, and they would probably occasion a good deal of expense and trouble. But by conveying the estate, whatever it may consist of, to trustees, and directing them to pay the provisions, and hand over the residue to the testator's eldest son, or other favoured party, the desired security will be obtained.

Again, when the testamentary deed is to be simply for behoof of a liferenter and fiar, there is no absolute occasion for a trust if the estate consists of lands; because, in that case, the separate rights of liferent and fee can be made secure enough by a disposition to A. in liferent, and B. and his heirs in fee. But if the estate consists of money, or other moveable property, a simple conveyance to one in liferent, and another in fee, would be very inconvenient in general, and might be unworkable. Here, also, a conveyance to trustees, for behoof of the liferenter and fiar respectively, with an order to make over to the fiar, on the termination of the liferent right, would be expedient, and often indispensable; and, even in the case of lands, a trust for behoof of the liferenter and fiar will be beneficial to both, particularly in reference to acts of ordinary administration, such as granting leases, cutting or thinning wood, and keeping the estate in order. Without a trust, unless the liferenter and fiar work well together, each will suffer both inconvenience and loss, and the estate may be prejudiced; but with a trust the estate can be duly managed and cared for on account of both, according to their interests respectively.

Another case in which the occasion for the constitution of a trust is the same, whether the estate consists of land or of moveable property, is when beneficiaries are under age, and it is intended to suspend the vesting of their right till majority, or marriage, or the occurrence of some other contingency. Here the objects of the testator cannot be accomplished without the interposition of trustees. The testator, moreover, may wish to have lands sold, and the price distributed, or funds realized, and invested in the purchase of lands. These objects, no doubt,

might be competently attained through the heir or donee, but they might be frustrated if he should be unfortunate or unfaithful; and there can be no doubt that in such cases the aid of trustees ought to be called in.

It may also, in some cases, be of importance to have trustees interposed, even when no separate or contingent interests are to be created; if, for example, the beneficiary is likely to be in minority when the testator dies, and if there is land estate in course of being feued to advantage; or if there are leases which may have to be renewed. Tutors and curators have no power by law to sell lands, and cannot do so for an annual payment or feu-duty any more than for a capital sum; and their powers of granting leases, and in other important particulars, are very limited. In place, therefore, of the proprietor of lands, in the above circumstances, granting a mere nomination of tutors and curators to his children, it may be advisable for him to convey his lands to trustees, to be held for the heir till he comes of age, or till the event happens on which his right depends; and to give the trustees power to grant feus, or leases, or powers of management generally, such as the circumstances seem to require. The trustees can be named tutors and curators also.

But I need not multiply cases. What I have said will serve to show generally the principles on which to determine whether a testator can or will best attain the object he has in view by granting a conveyance to trustees for behoof of his heirs, or by granting the conveyance to his heirs directly.

The narrative of a trust-disposition and settlement corresponds with that in a general disposition and settlement. We have, then, the dispositive clause; and what has been said before, in reference to the use of words of *de presenti* conveyance, and of the word 'dispone,' in the case of the general disposition and settlement, applies equally to that of the trust-disposition and settlement.

The destination to trustees contained in the trust-disposition and settlement usually runs thus:—'To A, B, and C, and to such other person or persons as shall be hereafter named by me, by any writing under my hand, or as shall be lawfully assumed for executing the trust hereby created, and to the acceptors and survivors, and acceptor and survivor of them, (all of whom and their quorum are, throughout this deed, included and referred to under the general designation of "the trustees")': declaring that any two or one of them shall have sufficient power to act, and execute this trust, in case their number shall be reduced to two or one; but in trust for the uses, ends, and purposes after written; and to the assignees of the trustees.'

NUMBER OF
TRUSTEES.

In the case here given there are only three trustees named; and with such number it is enough to say that any two or one shall have power to act if the number shall be reduced to two or one. And probably such power would be implied if the deed were granted to the survivors and acceptors, or survivor and acceptor. But the special declaration is

usual, and should not be omitted; and if the trustees are numerous, and three or more are required to make a legal quorum, the clause should be varied so as plainly to authorize a smaller number to act by themselves, if it is intended that the management shall remain with such smaller number, notwithstanding the failure of the full number making up a quorum.

The disposition here is to the trustees named, and to such others as TRUSTEES
AFTERWARDS
NAMED. shall be named by the testator, or as shall be lawfully assumed, and to the survivors and acceptors, etc. In such case, when the testator afterwards names additional trustees, the disposition in the above terms is expressly a disposition to them, as well as to the original nominees. But when the trust-deed is granted under power of alteration, express or implied, as testamentary trusts always are, and when it remains undelivered till the testator's death, the destination to trustees to be named has been held not essential in order to make the disposition effectual as a conveyance to a trustee subsequently named along with others originally named.¹ It would seem, from the opinion of the Lord Justice-Clerk Hope in the case of *M'Killigin*, that even when the appointment as to all the trustees originally named was recalled by a codicil, and there were new nominees by the same or another codicil, in whose favour neither the deed nor the codicil contained any dispositive words, the disposition, nevertheless, as altered by the codicil, and as delivered only when so altered, would be held a good conveyance to the trustees named after its date; and, in conjunction with the codicil, would be a valid warrant for direct infeftment or notarial instrument in favour of the new nominees, or might validly be registered by them. The warrant of registration in such case would run thus:—'Register this 'trust-disposition and settlement, along with the codicil annexed thereto, 'dated , on behalf of A., B., and C., as trustees under the said 'trust-disposition and settlement and codicil.' If the codicil is written separately from the trust-disposition and settlement, the word 'annexed' will of course be left out of the warrant written on the trust-disposition and settlement; and on the separate codicil there will be written either a corresponding warrant of registration, or simply a docquet bearing that 'this is the codicil referred to in the warrant of registration written on the trust disposition and settlement granted by D., 'dated .'

The form of disposition above given is to the trustees, and the survivors and acceptors, etc. But unless the deed shows it to be the testator's intention that the nomination shall subsist only as a joint appointment, or so long only as a certain number shall survive and continue to act, it will not fall to the ground, even as a conveyance, by the non-acceptance or death of some out of the whole nominees. It will stand as a disposition to such as shall accept, and to the survivors or survivor of them. We shall see that even if all the truster's nominees

¹ *M'Killigin*, 23d Nov. 1855, 18 D. 83.

shall die, or decline to act, the trust will still receive effect; the Court in that case naming a judicial factor to execute its purposes. But here we are considering the effect of the dispositive clause in the trust-disposition. Thus, in a case where five trustees were named, and three declined to accept, the remaining two accepted, and were found entitled to execute the trust.¹ A similar judgment was pronounced in another case, where, out of six trustees named, three accepted and three declined. In this case two were a quorum.²

SINE QUO NON. It is essential that a trustee named as a *sine quo non* shall accept, unless his acceptance is plainly not intended by the testator as a condition of the constitution of the trust-management. If he accepts, his concurrence will be indispensable in every act professing to be done by the trustees;³ but his acceptance may not be meant as a condition of the constitution, nor his survivance of the continuance, of the trust-management,—in which case the trust will stand notwithstanding his declinature.⁴

SURVIVORSHIP. And when, as is all but invariable in testamentary trusts, the trust-conveyance is granted to the trustees as a body, and the survivors and survivor of them, so as to give those who are trustees for the time a joint right in the estate *quod* trustees, not a separate right as individuals, the survivors and survivor do not require to make up titles as heirs of provision to one who predeceases.⁵ The quality of their original title is such, that the death of any one operates in favour of the survivors or survivor, equally with the non-acceptance of any one in favour of those who accept.

Moreover, when the conveyance in the trust-deed is to the trustees thereby named, and the survivors and survivor, the benefit of survivorship is extended to trustees afterwards named by a codicil, though the quality of survivorship is not referred to in the codicil.⁶ And when, in implement of the trust-deed and codicil, a disposition was granted to the acting trustees as trustees, and their 'heirs and assignees,' but in trust, etc., it was held that the trust controlled the title, and that the quality of survivorship was in the title equally as in the trust.⁷ The disposition, however, ought to have contained a destination in accordance with that in the trust-deed and codicil. And, even though the quality of survivorship should not be expressed in the nomination, no right in the trust-estate, and no share or portion of the estate, would fall upon the death of one of several trustees to his heirs *quod* such.⁸ On this principle, and because it was assumed that the testator would prefer to have his estate managed by one of his own nominees rather than by a

¹ Campbell, 26th June 1752, M. 14,703.

² Halley, 20th February 1840, 2 D. 623.

³ Vere, 1st June 1791; Bell's 8vo Cases 554.

⁴ Forbes, 2d Feb. 1808, M. App. *Solidum et pro ratâ*, No. 3.

⁵ Gillespie, 11th March 1824, 2 Sh. 795.

⁶ Gordon's Trustees, 17th July 1851, 13 D. 1381.

⁷ *Ibid.*

⁸ Lord Justice-Clerk Hope in Gordon's case.

judicial factor, the Court refused to appoint such factor in a case where one of two trustees died, leaving only one surviving, although the quality of survivorship was not expressed in his appointment.¹

We were in use to have next the constitution of a quorum of the trustees,—a term signifying such number, or such proportion of the total number, of the acting trustees, as are to have the full powers which are conferred by the deed on the whole acting trustees.

The term 'quorum' appears to have its origin in the style of the commission of Justices of the Peace. Their commission being, in former times, written in Latin, there followed, after the nomination of the whole parties, a clause declaring so many of them competent to transact the judicial business, *of whom* (that is, of which number) it was directed that some particular individual should be one. This last clause began with the word '*quorum*,' which thus came to have the meaning now given to it, as applicable to that proportion or number of the members of a general official body, who are entitled to exercise the powers of the whole body.²

In corporations, as a general rule, the majority of the members appears to form a quorum by law;³ and now, by an Act passed in 1861,⁴ it is provided that 'all trusts, constituted by virtue of any deed, or 'local Act of Parliament, under which gratuitous trustees are nominated, 'shall be held to include' ('unless the contrary be expressed') 'a provision that the majority of the trustees accepting and surviving shall 'be a quorum.'

By the Act 26 & 27 Vict. cap. 115 (1863) the above Act is declared to be applicable to all trusts constituted as aforesaid, 'at whatever time such trusts may have been or shall be constituted,'—a construction which had previously been given to the Act by the Court.⁵ The Act of 1863 further declares, that its provisions 'shall extend to and include gratuitous trustees who are appointed, or who hold *ex officio*.'

By sect. 3 of the Act of 1861, it is declared that 'a gratuitous trustee shall, for the purposes of this Act, be held to be any trustee who 'receives no pecuniary or valuable consideration for performing the 'duties of a trustee, and is under no obligation, without special acceptance of such office, to discharge the duties of trustee: provided always 'that nothing in this Act shall extend to any trustee appointed under 'the contract of any trading company.'

The provision above quoted, whereby, in those cases to which the Acts apply, the majority is constituted a quorum, corresponds with what I was in use to recommend for adoption in the constitution of testamentary and other family trusts. The constitution of a quorum is very important, as a practical matter; because not only may unanimity be unattainable, but accidental absence or sickness, or some other cause, may

¹ Findlay, 30th June 1855, 17 D. 1014.
See also Seton, 28th Nov. 1855, 18 D. 117.

² Blackstone, i. 422.

³ *Ibid.* i. 600.

⁴ 24 & 25 Vict. c. 84, s. 1.

⁵ Reid, 31st March 1863, 1 Macph. 774.

MAJORITY.

prevent some one or more of the trustees from taking an active part in the management ; and although there are circumstances, and apparently some classes of cases, in which even less than a majority of the whole accepting trustees—(where, for example, one not acting has an adverse interest)—can competently transact as for the whole trustees, there would often be a risk of the trust coming to a stand unless it could be carried on by a quorum. The statutory provision as to this appointment (where the Acts apply) is that the majority of the trustees surviving and accepting shall be a quorum. This is the natural course ; and where the Acts apply, and the parties approve of the statutory provision, the trust-deed will contain no clause constituting a quorum. If the Acts do not apply, or, in a trust of the nature of those to which the Act applies, in case an arrangement with respect to a quorum different from that made by the Act be desired, the trust-deed must express what number of trustees, or what proportion of the whole number of trustees, is to constitute a quorum ; but it will be kept in view, that if a less number than the majority shall be named a quorum,—two, for example, when there are four trustees,—and if there be no *sine quo non*, there may be two quorums, each claiming right to exercise the powers of the whole body ; whereas, by adopting the statutory provision, where that can be done, or by a single provision in the trust-deed when the Acts do not apply, a working party may in general be secured, and we may also look for consistency in their operations. But when the majority form a quorum, and one or more of the trustees has an interest adverse to that of the estate, the others, or a majority of them, will be held entitled to act.¹ Indeed, when the trust did not constitute a quorum, two out of four trustees (one of the others having an adverse interest) were held entitled, along with the beneficiaries, to sue in an action for the protection of the trust-estate.²

POWER TO TWO
OR ONE TO ACT.

We next come to the declaration that ‘any two or one of the trustees shall have always full power to execute the trust, in case the number of those accepting and acting for the time shall be reduced to two or one.’ Mr. Bell, in his Law Dictionary, says, ‘Generally speaking, where the quorum fails by death, or otherwise, the nomination falls ;’ and the same doctrine is laid down by Professor Bell.³ This, I apprehend, is a point which would be regulated by the testator’s intention ; as to which the clause I have suggested will prevent any doubt from arising. It is not desirable, however, that a trust which is to be of long continuance should be left with only two trustees, or one. If there are only two, they must, as a general rule, concur in every act, in order to validate what they do. When one of two trustees went abroad, the Court held that the other (the trustee remaining in this country) had no power to act alone, or at least that his power to do so was extremely doubtful ; and they appointed a judicial factor.⁴ If there is

¹ Shanks, 4th March 1830, 8 Sh. 640.² Smith, 7th Feb. 1854, 16 D. 482.³ Bell’s Principles, p. 726.⁴ Nisbet, 31st Jan. 1835, 13 Sh. 384 ;
see also, on this point, Smith, 20th
March 1862, 24 D. 838.

only one trustee, his death or incapacity will throw the management into the hands of a judicial factor. When, therefore, there are only two trustees, or only one, and the trust is to endure for some time, it will be expedient to have one or two additional trustees assumed, unless the power of assumption is excluded by the trust-deed.

I have proposed, in the style which has been given of the dispositive clause, or destination to the trustees, to introduce an interpretation clause, to the effect that all the trustees, or their quorum, shall throughout the deed be included and referred to under the general designation of 'the trustees.' The object of this provision is to render the proper trust-clauses more concise and distinct than they can otherwise be. Take, for example, the powers of the trustees. Without the interpretation clause, each leading power will be found usually to run thus:— 'With power to my said trustees hereby named or to be named by me, 'or to be assumed as aforesaid, and to the acceptors and survivors or 'acceptor and survivor of them, or their quorum,' to do so and so. With the interpretation clause we merely say,—'With power to the trustees.' As there are usually a good many powers, and the remark now made applies to several other clauses as well as to the powers, it will be found a considerable convenience (not to speak of the advantage in euphony) to adopt the interpretation clause.

INTERPRETA-
TION CLAUSE.

The destination closes with the words, 'and to the assignees of the trustees;' and, supposing no interpretation clause to be introduced, this clause will probably run somewhat more fully. The destination to assignees is usual, and should not be omitted. When the trust-conveyance and precept of sasine were both conceived in favour of the trustees and their assignees, and the trustees had power to sell, it was found that the precept could validly be assigned to a purchaser, so as (with the disposition and assignation to him) to become a valid warrant for an absolute and not a mere trust infestment.¹

ASSIGNEES.

I apprehend that, even without the special destination to assignees, the precept or conveyance can be assigned to the above effect, unless the assignation is inconsistent with the scope and purposes of the trust. The power of the trustees to dispoise and assign depends on the nature and purposes of the trust under which they act. If they have power to dispoise, they will, I apprehend, have power to assign the disposition or precept of sasine, which last will, if possible, be read as a mere relative and executive clause, not as intended to have a separate and absolute signification.²

We come next to the description or specification of the subjects conveyed by the trust-deed, in regard to which it is enough to refer to what has been already said on the subject of the description in the general and special disposition and settlement. Formerly, to facilitate the completion of the trustees' title, it was important to have, in the trust-dis-

SUBJECTS
CONVEYED.

¹ Cockburn, 4th June 1836, 14 Sh. 889.

p. 236, 3d Ed., and a valuable note by

² See on this subject Bell's Principles,

Lord Corehouse in Cockburn's case.

position, a special description of all the lands conveyed by it. But, even when such description was supposed to comprehend the whole estate, a general conveyance of all lands and other heritable estate belonging to the testator, or that should belong to him at the time of his death, was usually added, lest anything should be omitted; and likewise to obviate the necessity of a supplementary deed, in order to bring subsequent acquisitions under the trust. Now specification is rendered unnecessary by the Titles Acts of 1858, sect. 12, and 1860, sect. 8, as already explained in reference to the disposition and settlement. The necessity to specify heritable bonds was done away by the Heritable Securities Act of 1845.

As regards personal estate, very little benefit will arise from specification, provided there is a good complete general conveyance.

PURPOSES
OF TRUST.

TO PAY EX-
PENSES OF
MANAGEMENT.

We now come to the declaration or statement of the purposes for which the trust is created; the first of which usually is to pay the expenses of management. In some cases these expenses should be ordered to be paid out of the income of the estate, so as to preserve the capital entire. But in cases free of speciality the order should be simple, leaving the expense to be charged on the income or capital, or distributed between them, according to circumstances.

When the estate is placed in trust for behoof of a liferenter and fiar, or of parties standing in the like position, the rule for division of the expense of management, if the trust-deed is silent on the subject, is a point of much practical importance. In a case where there were separate interests in the income and capital of a trust-estate, between life annuitants and residuary legatees, and where the trust-deed contained a general direction to the trustees out of the trust-estate to pay 'necessary expenses,' it was held 'that in determining what should be considered as the residue, and what should be considered as the interest or produce primarily available for payment of the annuities, the whole expenses incurred in realizing the estate, or in changing the securities thereof, must be deducted from the gross capital; that the ordinary annual expenses of managing the trust-estate, including the ordinary expense of management of the heritable property, was to be deducted from the gross annual rents or profits thereof; but that all extraordinary expenses brought upon the trust-estate in the course of such management, such as the expense of processes for the division of a commonalty, or for augmentation of ministers' stipends, were to be deducted from the capital stock of the estate.'¹ The rules here laid down seem likely to be found useful in general practice.

TO PAY DEBTS.

We have, second, the order to pay the testator's debts, and his death-bed and funeral expenses. In proceeding to fulfil this purpose, the trustees, like executors, are entitled (if not interpellated by the diligence of creditors) to pay after six months from the testator's death *primo venienti*, they always acting *bond fide*;² and, if there is no endeavour on

¹ Pearson, 6th June 1840, 2 D. 1020.

² Rankine, 24th Nov. 1741, M. 16,201.

the part of creditors to obtain preferences by legal proceedings, the trustees are not bound to bring an action of multiplepoinding, calling all creditors for their interests.¹ This legal rule, however, is to be acted on with caution. The trustees ought, in all cases, to use due diligence to ascertain what debts and claims there are ; and, if the estate is not amply sufficient to meet them, to be careful that no preference is obtained by any one. As trustees, they ought to have regard to the interests of all concerned.

An ordinary *mortis causæ* trust-deed, however, though containing an order to pay the testator's debts, does not constitute a trust for his creditors, so as to prevent any creditor from obtaining a preference by diligence ; assuming that such creditor has not barred himself from claiming a preference by co-operating in any joint measure having in view the equal distribution of the funds. Any creditor not so barred can obtain a preference by diligence against the debtor himself whilst alive ; and in such a matter as this the trustees and executors, under an ordinary *mortis causæ* trust-deed, are merely the representatives of the testator.²

Having provided for payment of the expenses of management and debts, we may next have an order to pay legacies or provisions and annuities granted or to be granted ; and, lastly, the order as to the disposal of the residue of the estate. Or the trust-deed may order the residue to be disposed of as the testator has directed or shall direct by a separate deed or letter of instructions, to which there may be added (if it is desired in any event to exclude the heirs-at-law) a contingent direction for disposal, failing such deed or letter, or failing the persons or objects thereby intended to be favoured.

The execution of instructions separately from the deed of trust is often found convenient in reference to subsequent alterations. When such a form is adopted, these can be made by merely substituting one deed or paper of instructions for another, without cancelling the trust-deed, but, on the contrary, leaving it untouched. And when a testator's purposes undergo a material alteration, or even when one or more legacies are revoked, it is generally better to make a new deed than to add codicil on codicil to an old one. But with reference to the legal objection to the validity of a *mortis causæ* conveyance of heritable estate at the instance of the testator's heir-at-law in heritage, that the deed is to his prejudice, and that it was executed on deathbed, the trust-deed with separate instructions will be found particularly convenient ; because, if the trust-conveyance itself is protected from challenge on the head of deathbed, directions to the trustees, although they may be executed on deathbed, will not be reducible on that ground. I shall advert to this point further, when noticing the law of deathbed as affecting *mortis causæ* settlements of heritable estate in Scotland.³

Grants of legacies or annuities, contained in trust-deeds, or in rela-

¹ Alison, 26th Jan. 1793, M. 16,211.

11 D. 618 ; affirmed 14th Aug. 1850, 7

² Globe Insurance Co., 16th Feb. 1849,

Bell's App. 296.

³ See *post*, p. 903.

tive instructions, stand on the same footing exactly with the like grants in ordinary deeds of settlement as regards the rules for their construction; and I delay calling your attention to the terms of such grants, and questions arising in connexion with their vesting and otherwise, until we have disposed of the provisions more peculiar to the trust-deed.

The direction for disposal of the residue of the estate sometimes is to employ the same in the purchase of lands to be entailed; and I propose to deal with cases of that description as part of the subject of the entail.

With regard to the disposal of the residue, the direction is, in the general case, after fulfilment of the prior purposes, and on some particular event happening, such as the majority of the intended beneficiary, to pay or convey the same to such beneficiary; or, it may be, to convey or distribute the same to or among several individuals; or to apply it to some specified use or purpose. As regards questions of vesting, and most other questions, the directions for disposal of the residue stand on the same footing with grants of legacies and provisions, such directions being just legacies or provisions of the residue; and, as far as such questions are concerned, I will consider what relates to legacies and residue as one subject.

ANNUITIES.

When annuities are granted, it will in general be advisable to express the trust-deed so that the trustees can wind up the trust as soon as the other purposes are fulfilled, and notwithstanding the subsistence of the annuities. Whether they will be bound to keep up the trust entirely, or only to set aside a sum sufficient to answer a subsisting annuity, after all the other purposes are accomplished, and whether the consent of the annuitant to the absolute closing of the trust will be equivalent (as purifying the right of the residuaries) to the death of such annuitant, will be determined by the Court's construction of the testator's intention.¹ Generally, provision should be made for fully securing the annuitants. If, however, there is simply an order to make over the estate to the residuary legatee, under burden of the annuities, but without stipulation for security being taken for payment of the annuities, or for continuance of the trust until the annuities lapse, the trustees are bound to pay the free balance of the estate to the residuary legatee, on his engaging to grant simple bonds of annuity, and are not entitled to require the residuary legatee to give heritable security for the annuities.² When there is proper land-estate, I think it is advisable to direct the trustees to make subsisting annuities a real burden on an adequate portion thereof; and, when there is no land-estate, to direct or authorize the trustees to buy for the annuitants corresponding annuities from Government or a well-established assurance company, and to pay the price out of the trust-funds, or otherwise secure the annuity to the holder's satisfaction. And, when there is a land-estate suitable for feuing purposes or for building-leases, it may be useful to make provision in the trust-deed for restriction of the security for the annuity, so that the same shall not affect the rights of the

¹ See *L'Amy*, 5th Dec. 1850, 13 D. 240.

² *Kerr*, 12th Feb. 1853, 20 D. 562.

feuars and tenants, but only the yearly feu-duty or rent and the casualties. The *minimum* rate of feu-duty or rent will also be specified.

After the statement of the purposes of the trust, we have the clauses conferring powers on the trustees. POWERS OF TRUSTEES.

As trustees have sundry powers by law, varying according to the nature and objects of the trust which they are to execute, it may be well to show that the special powers given by the trust-deed are not to supersede or affect the powers arising by law. For that purpose, there may be introduced in the trust-deed, immediately before the enumeration of the special powers thereby given, the following or some similar general clause :—‘ And I hereby give to the trustees the fullest powers of administration and management of my estate falling under this trust for the purposes before mentioned ; and in particular, and without prejudice to the powers and privileges belonging or competent by law to trustees, or to the general powers of administration and management above mentioned, I authorize and empower,’ etc. [Here will commence the enumeration of the special powers to be conferred on the trustees.]

In trust-deeds executed prior to 1861, the first of these powers generally was the power to assume new trustees, which might be either in addition to the original number, or in place of any of the original trustees who should die, or decline to accept, or who should resign the trust, supposing power of resignation to have been given. It was very important that trust-deeds should contain power of assumption. Trustees had no such power at common law ; and, if they could not assume new trustees, the trust necessarily fell under judicial management, in case all of those originally named should fail before the purposes were fulfilled. Now, all trusts to which the Acts of 1861 and 1863 apply are held to include (unless the contrary be expressed) ‘ power to assume new trustees.’ Where, therefore, these Acts apply, and when their provisions on this point are approved of, the trust-deed need not contain power of assumption. Where, however, the Acts do not apply, or where the power conferred by them is to be withheld, or limited, or qualified, or where larger powers than those of the Acts are to be given, and generally, when any provision of a special nature is in view, —the testator will require to express his intention in the trust-deed. POWER OF ASSUMPTION.

Trusts will be found in which the power is accompanied by an order to exercise it so that there shall never be fewer than a certain specified number of trustees. But that may be very inconvenient. It is well to recommend that a certain number shall be kept up ; but anything beyond a recommendation is to be avoided, as suitable trustees to fill vacancies are not always to be had ; and the order may be overlooked, and acts done without adverting to it will be liable to question in consequence.

The power of assumption can be exercised by a trustee on deathbed.¹ When it is of a special nature, however, it must be exercised according

¹ Roughhead, 5th March 1833, 11 Sh. 516.

to its own terms. If it goes no further than to allow the supplying of vacancies, no new trustee can be appointed except on the failure of an old one; and when, under such a power, three trustees were assumed whilst there were only two vacancies, the assumption was held void as to all the three.¹

Power is sometimes granted in marriage-contract trusts to the maker of the trust, and in testamentary trusts to the beneficiary, to name additional trustees. In marriage-contract trusts, the parties to the contract have been held to possess such power, without any special provision to that effect, in cases where all the trustees named have failed by death, non-acceptance, or resignation. The exercise of the power, however, was only allowed after decree had been obtained in an action of declarator, and after approval by the Court of the parties proposed to be named.² In the like case it would be very convenient to give those interested in the residue of the trust-estate the power of appointment of new trustees, the names of the parties proposed being in the first place submitted to the Court and approved by them. But the power of adding to the acting body of trustees ought not to be reserved to the truster, or conferred on the beneficiary, without giving the acting trustees a veto; otherwise great inconvenience and abuse might obviously arise. When, however, power was given to the beneficiary, with consent of the majority of the trustees, to name new trustees, and the original trustees all died, an appointment of new trustees made by the beneficiary after the death of the original trustees, and where, for want of their consent, the terms of the power could not be literally complied with, was sustained.³

In some few cases power is given to each trustee to name his own successor. This can be allowable only when the trustees, or parties whom they represent, are to incur permanent personal liability, or have personal interests in the trust-estate, or in some such exceptional circumstances; and where, for their ultimate security or protection, it may be necessary to give them extraordinary powers of control in relation to the management, even after they cease to act.

**POWER TO
RESIGN.**

I was in use to recommend that trust-deeds should contain power to the trustees to resign the trust; but where the Acts before quoted apply, all trusts are held to include (unless the contrary be expressed) 'power to the trustees to resign.' In such cases, therefore, express power to resign need not be given.

The further powers will depend in some measure on the objects which the trust has in view; and the want of express power will, to some extent, be supplied by reference to these objects. It will be held that the trustees have such powers as are necessary for enabling them to manage and execute the trust according to the testator's directions. On

¹ *Ferrie*, 31st May 1834, 12 Sh. 672.
See also *Davidson*, 9th July 1835, 13 Sh. 1082.

² *Lindsay*, 19th June 1847, 9 D. 1297;
Tovey, 11th March 1854, 16 D. 866.

³ *Dunlop*, 11th March 1835, 13 Sh. 681.

this principle, although trustees frequently have express power to enter on the possession and management of the deceased's estate, and to make up titles thereto in their own persons, they can and clearly ought to do so without express power. And, even though the validity of the trust-deed in their favour may be under challenge in an action of reduction at the instance of the truster's heir, they are entitled to obtain a feudal right to the estate in an action of adjudication against the heir himself in implement of the trust-deed.¹ The heir's reduction, if successful as to the trust-deed, will authorize the reduction of the adjudication in implement as well as of the deed itself. But the challenge of the deed is no bar to the adjudication, so long as the deed is not actually reduced.

POWERS OF TRUSTEES.

Power of sale of the trust-estate may also be implied as necessary for enabling the trustees to execute the purposes of the trust. But that is a power of an extraordinary character, and not to be readily allowed by implication; especially when, without such power, the directions in the trust-deed will not operate to exclude the testator's heir-at-law from the succession to lands conveyed by the trust-deed.

SALE OF TRUST-ESTATE.

We have several cases in which the power was held to be implied as necessary for enabling the trustees to fulfil the trust-purposes, or was conferred on the trustees by the Court *ex nobili officio*. Thus, when with the estate remaining unsold there was an annual deficiency of income to keep down yearly charges, and the capital was getting gradually consumed, power to sell was held to be implied as necessary for enabling the trustees to fulfil the order in the trust-deed to pay debts.²

Where the primary purpose of the trust was the payment of the testator's debts, the heir having right to the residue of the rents was found entitled to require the trustees to sell, so as to raise a capital fund out of which to pay the capital of the debts, and leave the rents of the remainder of the estate free for his use. The trustees were not bound or entitled to pay the capital out of the rents, and keep the heir out of the estate, merely because the trust-deed gave them no express power to sell.³ Again, where the testator in his trust-deed had directed particular lands to be sold for payment of his debts, and the remainder to be entailed, and where, after the sale of the lands directed to be sold, some of the testator's debts remained unpaid, the Court, in the exercise of its *nobile officium*, gave the trustees power to sell part of the lands which the testator had ordered to be entailed.⁴ A sale was also sanctioned by the Court, without specific powers, on grounds of expediency, for enabling the trustees of a mortification (or trust in perpetuity for charitable purposes) to realize a superiority of no patrimonial value, but which, for political purposes (as the law then stood), was worth £1000.⁵ But where the truster had made an entail of all the lands belonging to

¹ Mure, 23d May 1851, 13 D. 986.² Henderson, 22d June 1841, 3 D. 1049.³ Graham, 21st December 1850, 13 D. 420.⁴ Erskine's Trustees, 13th May 1829,

7 Sh. 594.

⁵ Moore's Mortification, 25th June 1814, F. C.

him, except a small property which it was admitted that he did not intend to entail; and when he afterwards executed a general trust-deed of all his estate, heritable and moveable, except the entailed estate, directing the trustees to employ the proceeds arising from the trust-estate in the purchase of lands to be entailed, but giving no order to entail the property in question, and no power of sale; it was held that there were no directions sufficient to authorize the sale of that property, nor to indicate the testator's intention to exclude his heir-at-law from succeeding to it.¹ This case is an instructive one. The conveyance in the trust-deed undoubtedly included the property in question, which the trustees proposed to sell; but there was no express power to sell it; and, as the lands to be entailed were such as should be purchased with estate realized by the trustees, it seems to have followed that the heir-at-law became entitled to said property on the footing of the trustees having no directions to realize it, and of its therefore being intestate succession.

The want of a power to sell appears to have contributed to a similar result in the case of *Leith*.² And here it may be observed that, where it turns out that part of a succession falls to heirs *ab intestato*, the persons to be looked for are those holding that character as at the death of the testator, not as at the period when it is ascertained that he died intestate as to part of his estate.³

It is of importance, in framing the power of sale, to express it so as to relieve purchasers of all concern with any question as to the necessity for exercising it, or of seeing to the application of the purchase-money. The power should be placed in the absolute discretion of the trustees; and the purchaser should simply require to see that there is the power.

The power to sell implies power to receive and discharge the price, and grant all writs requisite for carrying the sale into effect. But it is usual to express all those particulars in, or as connected with, the power of sale; and to say that the trustees shall be entitled to bind the testator's representatives in absolute warrandice, or such other warrandice as they shall think proper.

I may here notice, that, in framing trust-deeds in cases where sales may or may not be necessary, care is required to prevent claims (not called for by the circumstances of the estate) from being created on the part of the Inland Revenue, by the form of words used in reference to sales. We not unfrequently meet with trust-deeds by which the testators convey their estate to trustees, 'in order that' the trustees may realize and recover debts, sell lands, and employ the proceeds, etc. If the trust-deed is so expressed, it will be construed as containing an absolute order for the sale of the lands; and the value of the lands, whether sold or not, will be liable in legacy-duty imposed by 55 Geo. III.

INLAND
REVENUE
CLAIMS.

¹ Robertson, 7th March 1832, 10 Sh. 438; reversed 1st Sept. 1835, 2 Sh. & M'L. App. 333.

² *Leith*, 19th June 1863, 1 Macph. 949.

³ Lord, 7th Dec. 1860, 23 D. 111.

cap. 184, Schedule, Part III., on the bequest of, or succession to, money. INLAND REVENUE CLAIMS. Duty will also attach although the trustees are not enjoined to sell, if they actually do sell, in virtue of not merely a power to sell, but absolute discretion as to exercising the power. Such power and discretion, followed by actual sale, are held equivalent to an order to sell.¹ The simple power of sale does not involve the claim for legacy-duty.² Nor is the claim involved though the simple power is followed by an actual sale, which, without the absolute discretion as to selling, is not held equivalent to an order to sell. Legacy-duty attaches also if the testator contemplated a sale, and the purposes of the trust could not be carried into effect without a sale, although by an arrangement with the beneficiary no sale actually takes place. That is, in fact, a sale to the beneficiary.³

When the legacy-duty does not attach, the right of the beneficiary is subject to the succession-duty on land, imposed by 16 & 17 Vict. cap. 51; but no person charged with duty under the Legacy-duty Acts is liable to be also charged with duty under the Succession-duty Act in respect of the same property.⁴

Another point liable to be affected by the testator's instructions as HEIRS OF BENEFICIARY. to the disposal of his estate, or residue thereof, is the right of succession to such estate or residue on the part of the heirs of the original beneficiary. To this point is in many cases incident the question, whether the right to the estate or residue falls, in case of the immediate beneficiary dying intestate, to such beneficiary's heir in heritage, or next of kin and heir in moveables. This question is practically of great importance; because, if the heir in heritage has right, he requires to make up a title in his person as heir of the immediate beneficiary in order to vest the estate or residue in himself; whereas, if he succeeds as next of kin, vesting takes place without a title. If the testator shall direct land-estate to be conveyed to a particular beneficiary, the right of such beneficiary is in 'the estate,' and is heritable.⁵ In such case, if the beneficiary dies intestate, his heir will require to make up titles in his person as heir, by general service or otherwise, before he can exercise any active right in the estate. Without such title he would have no power to execute a *mortis causâ* disposition of the estate; neither would the estate devolve upon his death to his own heir. It would fall to the next heir of the beneficiary. But if the direction in the trust-deed is to sell the estate, and pay over the proceeds, the interest of the beneficiary will be in 'the proceeds,' which are personal estate; and in case of his death the right will devolve on his heirs in moveables.⁶ In this case the heir of the beneficiary has power of testing without the completion of any title in his person.

¹ Advocate-General, 22d Feb. 1856, 18 D. 636.

² Advocate-General, 1st March 1852, 14 D. 585; affirmed 15th June 1854, 1 Macq. 760, and cases there referred to.

VOL. II.

³ Advocate-General, 23d Dec. 1850, 13 D. 436.

⁴ 16 & 17 Vict. c. 51, ss. 18, 29, & 30.

⁵ Durie, 30th Nov. 1791, M. 4624.

⁶ Dick, 4th July 1828, 6 Sh. 1065.

But if the direction to sell is followed by an order not to pay over the proceeds, but to invest the same on heritable security, the estate remains heritable;¹ and if there is merely a power to sell, and such power is not exercised, it does not follow that the succession is to be dealt with as moveable.² In Blair's case, the residue of an estate partly heritable, partly moveable, was destined to the 'heirs and successors of' A. B. The Court found that, so far as it consisted of heritage, it fell to the eldest son as heir in heritage,—so far as of moveables, to the younger children as heirs in moveables.³

POWER TO
BORROW.

Power to borrow money on the security of the trust-estate may also be implied from the scope of the deed; but, when there is any probability of occasion for borrowing, express power to do so should be given in the deed, as no one is likely to lend money on a doubtful power or security; and the Court have expressed their opinion, that, where the trust-deed does not by construction or implication empower the trustees to borrow money on the security of the trust-estate, it is not competent for the Court, in the exercise of its *nobile officium*, to confer such power on the trustees.⁴ In a case where the trust-deed (a marriage-contract) contained no power to sell, and no power to borrow, except for one special purpose, the Court refused to authorize a loan for a different purpose, viz., rebuilding a house situated on certain heritable subjects conveyed by the trust-deed, and which had become ruinous.⁵ The power to borrow, like the power to sell, should, when given, be framed so as to leave its exercise wholly in the discretion of the trustees; and to keep lenders free of all concern either with the occasion for the loan or the application of the money. Lord President Campbell says, 'suppose that no mention had been made of the purposes for which they were empowered to borrow, their borrowings and their heritable securities would have been good, to whatever use the money had been applied.'⁶ When the power is given in the terms here recommended, it may, if thought necessary, be limited to a certain amount. But, generally, when parties are lending money to trustees, it will be found advisable, even if the terms of the power do not render it necessary, to make inquiry as to the object of the loan, and not only to attend to the disposal of the money, but, as far as possible, to get assignations of the testator's debts, or of other claims affecting his estate, if any are paid out of it, or to have its application to the purposes of the trust duly vouched in some other way. The same caution may also be expedient in some cases when purchases are made from trustees. The power to borrow, of course, implies power to grant all the necessary deeds of security; but it is usual to give express power to grant such deeds.

Power to grant feus, or to enter into contracts of ground-annual, or to

¹ Dick's case.

² Blair, 14th Nov. 1849, 12 D. 97.

³ The same principle will be found in Cathcart, 26th May 1830, 8 Sh. 803.

⁴ Kinloch, 7th Dec. 1859, 22 D. 174.

⁵ Ker, 3d March 1855, 17 D. 565.

⁶ Dewar, 4th Dec. 1792; Bell's Octavo Cases, 541.

grant building leases, or agricultural or mineral leases, may or may not be of importance, according to the circumstances of the estate. For the safety of parties transacting with the trustees, the powers, if given, should be in broad terms; leaving the conditions of the feu, or lease, or ground-annual right, in the discretion of the trustees. It may be well, however, in some cases to state the *maximum* endurance of the leases.

POWER TO
GRANT FEUS,
LEASES, ETC.

The mode of investing the funds of the trust ought to form the subject of a power, and in most marriage and testamentary trusts does so. It is usual to authorize investments in the Government Funds, or on heritable securities. To these, parties or testators will often suggest additions, according to their own views. But great latitude is not desirable; and the purchase of stocks or shares involving universal liability should never be allowed. It may sometimes, however, be allowable to give trustees express power to hold and retain certain investments, or all the investments made by the truster himself, as long as they shall think fit, even though these are of the nature here spoken of. In trusts of the nature of mortifications, that is, trusts with perpetual endurance, the purchase of lands may generally be a very suitable mode in which to authorize the employment of the funds.

INVESTMENT OF
TRUST FUNDS.

When special powers of investment are not given, the safe rule is to invest in the Government Funds, or on heritable securities in Scotland. Trustees not specially empowered, and going beyond these lines, might perhaps be exposed to claims on the part of the beneficiaries, in case of loss arising. Even on heritable security, however, the trust-funds ought not to be lent to any one or more of the trustees themselves; because, by such a transaction, the borrowing trustee may, and at all events intends to, make personal profit by the use of the funds over which he is a trustee, and which he is not entitled in any way to turn to his own personal benefit.¹ Investment in the Funds is perhaps open to objection, in respect that no trust can be referred to in the transfer to the trustees as purchasers. But, as far as regards the active power of the trustees, there is no difference between such an investment, and one on heritable security, in the names of trustees. They can, in either case, realize and misappropriate; and even though the trustee shall become bankrupt, and be sequestrated, his trustee would not, by the law of Scotland, be entitled to claim the money in the Funds, any more than money laid out on heritable bond; as the sequestration transfers to the trustee for the general creditors just what the bankrupt held, and no more.²

When trustees are about to exercise express powers given them by the trust-deed, they must proceed in the way directed or intended by the deed. The effect of going beyond the express power as to the assumption of new trustees has already been pointed out. Where power was given to sell, and the trustees went beyond what was expressed in the trust-deed, the sale was reduced.³ When power is given to purchase

¹ Perston, 9th Jan. 1863, 1 Macph. 245.

² Gordon, 5th Feb. 1824, 2 Sh. 675.

³ Coltart, 26th March 1853, 15 D. 606.

PURCHASE OF
LANDS.

'lands,' and no words enlarging the meaning of that term are annexed, the 'property of lands' is meant, not merely heritages of any description. Such power was held not to authorize the purchase of feu-duties.¹ The purchase of superiorities, which in a feudal though not in a natural sense are lands, was authorized in an earlier case.² But there was no opposition; and, as the law then stood, the purchase served a special political object, which a similar purchase would not answer now. In a later case,³ trustees who were appointed to invest funds in the purchase of lands,—to be conveyed to the heir in possession of the testator's entailed estate,—were found not entitled to purchase the feu and teind-duties payable to the superior of said estate. If, therefore, the purchase of feu-duties, or any heritable property besides the property of lands, is to be allowed, the power of purchasing should be expressed accordingly. In another case, formerly referred to, where trustees who were ordered to invest the funds on heritable security, or in any public funds, stocks, or securities, kept the amount in their own hands, and traded with it, paying interest at five per cent. to the beneficiaries, they were found liable to account to the beneficiaries for the profits (exceeding five per cent.) realized by the use of the money; and that notwithstanding they had paid up the principal whenever called on, and no *mala fides* was alleged.⁴

POWER TO
REFER, ETC.

The right to compound claims, and to submit to arbitration, is often a valuable addition to the powers of trustees; and trust-deeds, in general, should expressly confer the power, as compromise and arbitration are extraordinary acts, competent only to those absolutely interested in the subject-matter of the settlement.⁵

FACTOR FOR
TRUSTEES.

We frequently see occasion for the appointment of a factor or cashier on behalf of trustees. In one reported case, the truster himself, in a trust for creditors, named one of the trustees to be factor, to uplift rents, etc.; and it was held that the other trustees could not supersede the person so named.⁶ In general, however, it is not a good arrangement to have a factor who is not removable by the trustees, especially in a testamentary trust. When no factor is named by the testator, trustees clearly have power, without special authority in the trust-deed, to appoint a factor for executing acts of ordinary administration,—such as uplifting rents, and applying the same in payment of the annual burdens and charges affecting the estate. In the case of Sym,⁷ Lord Mackenzie said he did not decide that trustees may not employ a factor in the widest sense, if they do their duty in respect to the factor; and in the case of Thomson⁸ the duties of the trustees were held to render the ap-

¹ Governors of Cauvin's Hospital, 29th Jan. 1842, 4 D. 556.

² Sharp, 11th February 1823, 2 Sh. 203.

³ Pollexfen, 14th July 1841, 3 D. 1215.

⁴ Cochrane, 1st Feb. 1855, 17 D. 322. The same principle was followed in the

case of Laird, 26th June 1855, 17 D. 984.

⁵ Menzies, p. 719.

⁶ Fulton, 15th Feb. 1831, 9 Sh. 442.

⁷ Sym, 13th May 1830, 8 Sh. 741.

⁸ Thomson, 16th February 1838, 16 Sh. 560.

pointment of a factor unavoidable, and an act of ordinary administration.

Trustees have also power, without express authority in the trust-deed, to name law-agents for managing the business of the trust. The trustees under a marriage-contract trust, who were two in number, and both members of the legal profession in Edinburgh, employed a third party as law-agent for conducting the affairs of the trust. The beneficiaries objected to pay the law-agent's account for business, alleging that, as a general rule applicable to all trusts, trustees were bound to transact the ordinary business of the trust personally and gratuitously, except when the trust is engaged in litigation. The Lord Ordinary (Ardmillan) declined to 'give effect to this plea, so broadly stated.' His Lordship says, 'There is no authority for it in the law of Scotland, and there is a well understood and established practice to the contrary.' He thought the appointment of an agent was not an improper step in the circumstances, and sustained his account; and the Court adhered.¹

But, in general, trust-deeds should confer express power to name factors, cashiers, and agents, and should point out to what extent the factors can be authorized by the trustees to act for them. The deed should also expressly authorize the trustees to give the factor, or cashier, or agent, a reasonable remuneration for his trouble, and leave to the discretion of the trustees whether to require caution for intromissions or not. If it is intended to give power to name one of the trustees themselves to be factor, cashier, or agent, the trust-deed should say so; and in that case especially the deed should express that the trustees have power to give remuneration for trouble. I need hardly remind you that, without express power to the trustees to name one of themselves to the office, a trustee acting as factor, cashier, or agent, will not be allowed more than costs out of pocket, and interest thereon; the interest calculated from the end of each business year, on the outlay incurred during such year.² The rule on this point is the same in cases where there are several trustees, and in which the appointment of a factor is almost matter of necessity, and where there is a sole trustee, or a judicial factor, or a curator *bonis*, who might act for himself without a separate agent.³ But, if there is power to trustees to name one of their own number to be factor, it is implied that the trustee whom they name as factor is to be remunerated.⁴

In trusts heretofore it was usual, after expressing the powers of the trustees, to introduce clauses of indemnity to the trustees from liability for one another, or for omissions, or for anything beyond their own personal acts and intromissions, likewise exempting third parties from concern with the trustees' actings. Now, by the Acts of 1861 and 1863,

CLAUSES OF
INDEMNITY
TO TRUSTEES.

¹ Hay, 18th Feb. 1861, 23 D. 594.

² Lord Gray, 12th Nov. 1856, 19 D. 1;

³ Flowerdew, 22d Dec. 1854, 17 D. 263; Douglas & Mackenzie, 12th Nov. 1856, 19 D. 1.

see also, as to the interest, Maxwell, 6th March 1850, 22 Jurist, 362; Bremner, 13th Dec. 1837, 16 Sh. 213; Napier, 2d

⁴ Goodsir, 19th June 1858, 20 D. 1141.

June 1835, 13 Sh. 853.

before quoted, all trusts to which these Acts apply are held to include, 'unless the contrary be expressed,' a provision that each 'trustee shall only be liable for his own acts and intromissions, and shall not be liable for the acts and intromissions of co-trustees, and shall not be liable for omissions.'

CLAUSE OF
EXEMPTION.

The provision on the above points formerly recommended was somewhat more detailed, being as follows:—'Declaring that the trustees shall not be liable for omissions in their management; nor for the omissions or neglects of the factors, cashiers, or others appointed or employed by them; nor for the responsibility of the purchasers, debtors, factors, cashiers, cautioners, and others whom they may intrust, or with whom they may transact; nor for the sufficiency of the stocks or securities on which they may invest the funds of the trust; nor for any loss that may arise by their holding and retaining the whole or any of the stock or other investments which shall be subsisting at the time of my death' (this as the case may require); 'neither shall they be liable *singuli in solidum*, nor for one another; but in their whole transactions and management they shall only be bound to act honourably, and each of them shall be accountable for his own actual and personal intromissions, and no further.' This clause may now, in some cases at least, be omitted altogether. How far its provisions, or any of them, are called for, will depend on the views of parties, and the circumstances of each case. But, when details are gone into, care should be taken to show that the detailed provisions are without prejudice to, but in supplement of, the enactments before quoted.

It is not to be understood, however, that the words of the Statute, or of the above clause, will receive their literal effect in all circumstances. In particular, neither the Statute, nor the above nor any other clause, will protect against breach or transgression of positive orders contained in the trust-deed. This will be illustrated by reference to one or two cases. Thus, where trustees, who were directed to invest the funds in heritable property or bank securities, deposited trust-money in bank, and refused to comply with a requisition from the beneficiaries to invest in the public Funds, they were held personally bound to make up loss arising through non-investment in the Funds.¹ Failure to observe an order to invest in heritable security was again found to involve testamentary trustees in personal liability.² Moreover, when the trust directed investment on good heritable or personal security, and the trustees invested in the purchase of a redeemable annuity on the life of the purchaser, with relative policy of assurance on his life for the amount of the purchase-money, this investment was held not in terms of the instructions, and the trustees were found personally liable for loss arising upon it.³ Nor will either the Act, or any clause of indemnity,

¹ Morrison, 9th Feb. 1827, 5 Sh. 322.

³ Bon Accord Marine Insurance Co., 13

² Mayne, 4th June 1835, 13 Sh. 870; D. 295.
Ross, 13th Nov. 1850, 13 D. 44.

protect against gross negligence, amounting to misconduct.¹ In Seton's case, the liability was enforced at the instance of the beneficiaries. But the trustees may be sued by a creditor of the trust-estate, if he suffers by their fault; the trustees being bound to employ the funds which come into their hands, or over which they have the control, to the purposes of the trust.² Moreover, trustees assumed into a trust are assumed into the management of the trust as a whole, and are bound to state in account their predecessors' as well as their own intromissions.³ And, if duly and timeously made aware of the particulars, they are entitled, and, I apprehend, bound, if necessary, to institute proceedings against their co-trustees on account of irregularities committed prior to their assumption.⁴

It would seem, however, that in a marriage-contract trust, where the original trustees had died, and new trustees had been named by the truster, in virtue of power reserved to him in the contract, and where the trustees were declared not answerable the one for the other, nor for involuntary losses, liability would not attach to the new trustees for not prosecuting the truster himself for malversations or defalcations, of which, apparently, the new trustees had no knowledge, and when it appeared that, even if they had prosecuted the truster, they could not have recovered from him.⁵ Apparently no claim had been made against the representatives of the original trustees in this case. The decision, therefore, does not in any way affect the question of their liability, as far as loss arose from neglect on their part.

Trustees will incur personal liability for expenses occasioned by their own wrong-doing; when, for example, they refuse to exhibit the trust-deed to a party having an interest in it. The expense of compelling production will fall on the trustees themselves.⁶ Also when they act *in mala fide*; for example, when they are pursuers in a lawsuit, and lose the case with expenses, it is no defence against the claim for expenses by the defenders, whom they have brought into Court, that they have no trust-funds.⁷ And when they defend in an action of damages, brought by a third party against their constituent, who, as they might see from perusing the correspondence in the case, had no good ground of defence.⁸ They will also, as a general rule, be liable for loss if they pay debts due by the testator, or legacies bequeathed by him, to the wrong party, or to a party professing to have power, but who has not power, to receive and discharge the debt or legacy.⁹

In the detailed clause of exemption before given, the trustees are expressly declared not liable for their factors, cashiers, or agents, further

¹ Seton, 18th Dec. 1841, 4 D. 310.

² Thomson, 24th June 1829, 7 Sh. 787.

³ Sommerville's Trustees, 8th Dec. 1854, 17 D. 151.

⁴ Ross's case, before cited.

⁵ Scott, 26th November 1862, 1 Macph. 57.

⁶ Dickson, 20th Nov. 1829, 8 Sh. 99; Nicol, 19th June 1829, 7 Sh. 777.

⁷ Robertson, 4th Dec. 1823, 2 Sh. 553.

⁸ Kay, 6th March 1850, 12 D. 845.

⁹ Macpherson, 19th Jan. 1850, 12 D. 486; Macfarlane, 12th May 1835, 13 Sh. 725.

LIABILITY FOR FACTORS.

than that they be habit and repute responsible at the time of their appointment. This may be a very important clause. Effect has been given to it even where there had been great negligence on the part of the trustees.¹ In the cases referred to, the trustees had express power to name factors, with a relative clause of indemnity. In Sym's case, before cited, there was neither power to name factors nor clause declaring the trustees liable only for intromissions. On the contrary, the trustees had a legacy left them as a token of regard, and in remuneration for trouble. In these circumstances, a trustee who named his co-trustee factor, and totally failed to check or control his administration, was found liable for loss arising through the factor's insolvency.

Again, we have a case in which trustees, who were declared exempted from liability for omissions and sufficiency of security, and were authorized to lend the trust-funds on heritable or good personal security, lent money to one of their own number on a security partly heritable, partly personal, and which proved deficient because of prior incumbrances. These might have been discovered on a search of the records; but no search was made. The trustees had employed duly qualified agents to transact the securities; and the liability for the loss was held to fall on the agents, not on the trustees.² After the recent decision, in which the Court held that trustees ought not, under any circumstances, to lend trust-funds to one of their own number, it is probable that such a decision as that in Graham's case will not be repeated, so far as regards trustees. Agents who fail in their duty, as in that case, will no doubt be liable for the consequent loss; but the trustees themselves will probably be held liable, unless they have special ground of exemption.

INTROMISSIONS.

The detailed clause next declares the trustees not liable *in solidum*, or for one another; but that each should only be bound to act honourably, and to account for his own actual and personal intromissions, and no further. All this appears to be covered by the statutory provision before quoted. At Common Law, trustees who had no such exemption were liable for one another.³ And though the responsibility was only for intromissions, it was not absolutely necessary to infer liability that the trustees should actually touch the money. Where trustees jointly signed receipts or other writs requisite for uplifting money, they were found liable equally as if they had actually received the money.⁴ The liability of an intromitter was incurred also by a trustee who concurred in signing the discharge of a heritable security on which trust-funds were invested, and in lending the money to a co-trustee on personal security.⁵ It does not appear that the law, as laid down in these cases (Blain, Moffat, and

¹ See Dalrymple, 4th Aug. 1784, M. 3534; and Traquair's Trustees, 6th Feb. 1835, 13 Sh. 417.

² Graham, 4th March 1831, 9 Sh. 543.

³ M'Clymont, 14th Feb. 1827, 5 Sh.

346; Kennedy, 28th June 1827, 5 Sh. 852.

⁴ Blain, 28th Jan. 1836, 14 Sh. 361; Moffat, 31st Jan. 1834, 12 Sh. 369.

⁵ Gray, decided in 1819—not reported, but noticed by Lord Moncreiff in M'Millan, 6th Dec. 1848, 11 D. 209.

Gray), is altered by the recent Acts. In Moffat's case, Lord Corehouse treats the lending of trust-funds to a trustee, and allowing a trustee to retain in his hands money lent to him by the truster, as acts exactly equivalent to each other. And I apprehend that, when a trustee is owing money to the testator at the time of his death, his co-trustees should require payment without loss of time after the commencement of the trust.

The trust-disposition will contain a nomination of the trustees to be executors of the testator; and, when granted by a father for behoof of minor children, it is usual to name the trustees, or some of them, tutors and curators to the children. It is not uncommon, also, to name the trustees to be tutors and curators to minor beneficiaries, to the extent of their interest under the trust, although the testator is not their father. When the trustees are named tutors and curators of minor children, the trust-deed ought to contain express exemption from separate responsibility *in solidum*; because the recent Acts extend only to trustees, and tutors and curators when not exempt are liable *in solidum*.¹ I may notice that, in Moffat's case, the question was raised whether any but the father can exempt tutors and curators from joint and several liability for their actings in that capacity. No doubt the power to exempt is given by Statute to fathers only. But persons named as tutors and curators by third parties, *quoad* particular bequests or estate, made or conveyed by such parties themselves, are more trustees than proper tutors and curators; and, viewing them as trustees, there can be no doubt of the power of the testator to exempt them. They ought to have a special clause of exemption, however; as it may be doubted whether they come within the provisions of the late Acts.

It is not now necessary to insert in the trust-deed, even if it contains a special conveyance, or in the special disposition and settlement, an obligation to infeft, or specification of the manner of holding; or, in the case of feudal subjects, a precept of sasine; or, in the case of burgage subjects, a procuratory of resignation. In the case of feudal subjects, the deed will contain procuratory of resignation. And trust-deeds, and dispositions and settlements, whether general or special, or both, will contain assignation to writs, reservation of the testator's life-rent, with power to revoke or alter at pleasure; and a clause dispensing with the delivery, and declaring the deed, though found in the testator's repositories undelivered at his death, to be equally valid as if delivered. These clauses ought to be inserted as matter of course.

Testaments, dispositions and settlements, and trust-deeds frequently contain an express clause of revocation of all prior deeds of settlement, or of some particular deed. And, if such deed be manifestly of a testamentary character, the power to revoke and alter it can be exercised at any time whilst the testator is of sound mind; supposing always that it

NOMINATION OF
TRUSTEES TO BE
EXECUTORS.

TUTORS AND
CURATORS.

REVOCATION OF
PRIOR DEEDS.

¹ Erskine, i. 7. 20.

is not a mutual deed by two or more parties, the rules as to which class of deeds are peculiar. Indeed, the right of revocation of a simple testament cannot be renounced or given up.¹ Moreover, the declaration inserted in a deed, that the same is delivered and irrevocable, will not be accepted as proving that it is so, when facts and circumstances show that it was not so regarded or dealt with by the parties. The facts will contradict and overrule the words.²

**MUTUAL
SETTLEMENT.**

The case of a mutual settlement or testamentary deed by two or more parties is exceptional as regards the power of revocation. Lord Fullerton says, 'A mutual will has this consequence, that it is not 'merely a declaration of intention, but an obligation not to revoke.' 'Thus far, a mutual will is a sort of contract.'³ It is usual to insert in such deeds power to both or all the parties to revoke, by a joint writing; and, the deed being testamentary, such power would clearly exist whether expressed or not. But as soon as the deed is executed and complete, it becomes irrevocable by any one of the parties separately, even as to estate conveyed exclusively by such party; and on the death of one of them it is irrevocable by the others, as far as regards third parties interested. But although, in a mutual deed of settlement by a husband and wife, there is conveyed to trustees all that may belong to either party at the time of their respective deaths, the surviving spouse is entitled, in opposition to the literal meaning of these words, to dispose at pleasure of money or effects paid over or delivered to him or her in terms of the mutual deed, and also of the savings arising thereon during the period of survivance. The deed is to be construed as a whole, and according to the true meaning of the parties as therein expressed.⁴ Such cases are always circumstantial; but it is desirable that the deeds should be expressed so as to avoid such questions as that which occurred in Nimmo's case.

**REVOCATION BY
FOREIGN DEED.**

On the principle which regulates the mode of authenticating deeds conveying heritage in Scotland, it was formerly held that a *mortis causâ* conveyance of lands so executed could not be revoked by a deed executed out of Scotland, and agreeably to the law of the place of execution, but not authenticated with the solemnities necessary in the case of deeds conveying Scotch heritage. We have now the opinion of seven against six of the Judges of the Court of Session, in a case submitted to the whole Court, that a trust-disposition and deed of settlement executed in Scotland might be validly revoked, even as regarded heritage in Scotland, by a will executed in England in the English form.⁵ But this case was not appealed; and, looking to the strong views expressed by the

¹ Dougall's Trustees, 25th Feb. 1789, M. 15,949; Trotter, 1st Dec. 1842, 5 D. 224.

² Ramsay, 11th July 1833, 11 Sh. 967.

³ M'Millan, 28th Nov. 1850, 13 D. 187; see also Hogg, 18th March 1863, 1 Macph. 647. Here it was observed that a mutual

settlement, though testamentary *quoad* the beneficiaries, is pactional *quoad* the granters.

⁴ Nimmo's Trustees, 24th Jan. 1840, 3 D. 458.

⁵ Leith's Trustees, 6th June 1848, 10 D. 1137.

minority of the Court here, the point can hardly be held as conclusively settled.

The revocation, when competent, may be accomplished by an express clause, either general or special. But in either case the testator's intention to revoke, as applicable to or comprehensive of the prior deed, must be distinctly shown. In Leith's case, the revocation, which was contained in a will in the English form, was of all former wills, codicils, and testamentary dispositions; and these terms were considered not sufficiently ample or distinct to reach an antecedent Scotch trust-disposition of heritage.

REVOCATION OF
PRIOR DEEDS.

The testator can accomplish revocation by destroying or cancelling the deed, equally as by an express clause of revocation.¹ And you will recollect that when the deed has been authenticated by sealing as well as subscription, and in its testing-clause expressly bears to have been so, it has been held that cutting off the seal will operate cancellation or revocation, though the subscription remains entire.²

Another proceeding, which is equivalent to revocation, is to execute a subsequent testament or disposition containing the same subject with that in some former deed, in whole or in part. In such circumstances, the deed last in date, although it contains no express revocation, supersedes all that go before it, so far as the prior deeds are inconsistent with or cannot stand along with it. Thus, if the testator, *mortis causa*, convey the same estate first in 1860 to A. B., subject to the power of revocation or alteration, and afterwards in 1864 to C. D., the estate on the testator's death will fall to C. D., and the first deed will be rendered nugatory, or at least subordinate.³ But where successive testamentary writings are executed, and especially where some of these are without the aid of a professional adviser, questions of great difficulty often arise as to the intention of the testator, and whether or not, or how far, the earlier deeds, or one or more of them, are superseded by those of later date.

There can be no doubt that, however convenient and desirable it may be to have the will of a testator in one or in few deeds, it may be competently expressed in any number of writings. The rule on this subject is thus stated by Lord Moncreiff in the case of Grant, to be immediately cited: 'I have always understood it to be a principle of the law of Scotland, that when a party deceased has left various writings, probative in themselves, for disposing of his or her property, preserved in the testator's custody, they are to be understood as constituting one settlement, in so far as they have not been revoked, and are not inconsistent with one another. And I concur in the statement quoted from the work of Mr. Williams' (an English writer on the Law

¹ Finlay, 29th July 1779, M. 3188.

² Nasmyth, 27th July 1821, 1 Sh. App. 65.

³ Rowan, 22d Nov. 1775, 5 Br. Sup. 423, 1 Ross's L. C. 653; Roxburghe, 29th May 1820, 2 Bligh's App. 619, and 1 Ross's L. C. 659.

of Executors, i. 116), 'that "a posterior will does not work a total revocation of a prior one, unless the latter expressly revoke the former, or the two be incapable of standing together;" and that, though a man cannot die with two testaments, yet any number of instruments, whatever be their relative date, or in whatever form they may be, so as they be all clearly testamentary papers, may be admitted to probate as together containing the last will of the deceased; and further, that though one may be partially inconsistent with another, the latter instrument will only revoke the former as to those parts where they are inconsistent.' There can be no doubt, therefore, that, as a general rule, it is competent to make a will in several writings. As formerly observed, questions relating to wills are to be decided by looking to the whole contents of the several testamentary documents left by the deceased, with a view to discover what is his intention; and this rule holds in questions as to the revocation of prior deeds, as well as on other points.

Much difficulty frequently arises in applying the rule. You will find this fully illustrated in the case of *Grant*,¹ in the special circumstances of which the Court held certain deeds as superseding others previously executed, though the latter were not expressly revoked. But the House of Lords held that there was no revocation, and that the writings (collectively) formed and were to be considered and taken as 'the will of the deceased.' Lord Truro laid it down as the rule, 'that if you can execute the whole of the papers as one testament, you are bound to do so.' His Lordship also made the following observation as to the duty of professional men in cases such as we are considering:—'It is perfectly well known to every professional man, that, when called in to prepare a will, his duty is to ascertain if there be any former testamentary paper; and, if there be, to take the testator's instructions whether he intends to revoke it or to make the new will subsidiary or additional.'

**REVOCATION
REVOKED.**

It was at one time questioned whether the voluntary revocation of a testamentary deed rendered the deed revoked void and null for ever afterwards; but it is now settled that in general, if the first deed has not actually been destroyed, it can be revived or set up by revoking the revocation of it. The principle of intention is again the test on which the decisions are founded. Thus, where a trust-deed, which was the last of several settlements, contained a revocation of all former wills and settlements, and was itself destroyed by the testator's directions, the revocation embodied in it was held to be destroyed along with the deed itself, and a previous will was thereby revived.² And the revocation of the last will was held to revive a previous will existing and not destroyed.³

The bankruptcy and sequestration of the testator likewise operate revocation of *mortis causa* conveyances. But if the bankrupt settles by

¹ *Grant*, 27th Feb. 1849, 11 D. 860; reversed 28th May 1852, 1 Macq. App. 163.

² *Howden*, 8th July 1815, F. C.

³ *Doves*, 31st May 1827, 5 Sh. 734.

composition, and is reinstated in what is contained in the *mortis causâ* conveyance, the revocation arising from his bankruptcy and sequestration would appear to be overruled. The conveyance would apparently be entitled to effect upon the testator's death.

Particular caution is necessary as regards the express revocation of prior settlements of heritable estate, unless the final deed happens to be simply in favour of the testator's heir-at-law. By the law of Scotland, testamentary deeds which convey or burden heritage in prejudice of the heir in such heritage, or which operate even indirectly to create burdens or charges upon the heir, are reducible if granted by the testator on deathbed. But the right of reduction on the above ground belongs exclusively to the heir, or those to whom he assigns it; and if (before assigning) he waives his right, no one else can sue reduction on that ground. Moreover, if the heir has no interest to prosecute the reduction, he cannot challenge the deed, which, in such circumstances, is not to his prejudice. If, therefore, a deed of settlement, excluding the heir, has been executed by the deceased, and is free of all liability to question on the head of deathbed, a subsequent deed of settlement, though in favour of a stranger, or some one other than the heir, will be free of challenge on the ground of deathbed, though undoubtedly executed on deathbed; because (the heir being excluded by the prior deed) it is no matter to him whether the subsequent deed stands or falls, and no one else can raise a challenge on the head of deathbed. The subsequent deed is thus protected by reason of the execution of the prior deed. But, as we have seen, when successive settlements are executed applicable to the same estate, or at least inconsistent with each other, the last in date supercedes the first. In such cases, therefore, the last deed is equivalent to revocation of the first, and becomes entitled to effect without express revocation of the prior deeds.

Express revocation of a testamentary deed, however (not being a deed by two parties mutually), may be validly executed at any time whilst the party is of sound mind. Revocation on deathbed is free of all challenge; and, supposing the deathbed deed to contain an express revocation of the prior deed, the result would be:—that the prior deed, being revoked, would be made inoperative, and in fact a nonentity, by the revocation; and, at the same time, the last deed itself, so far as containing a conveyance to the prejudice of the heir, being executed on deathbed, would be reducible by the heir on the ground of deathbed. The last deed would stand, so far as regards the revocation, which operates in favour of the heir; but, so far as it contained a conveyance in favour of a third party, it would be open to challenge, at the instance of the heir, as being executed on deathbed. The effect of the express revocation, therefore, in such circumstances would be to destroy the very deed which the testator was executing, by cutting down the prior deed, which alone warded off the challenge of the heir-at-law from the latter and deathbed deed; whereas, if he did not expressly revoke the prior deed, the chal-

DEATHBED
REVOCATION.

QUALIFIED
REVOCATION.

lenge of the heir would be barred, and the deathbed deed would stand.¹ So far, therefore, as we are dealing with heritage only, the practical lesson in such circumstances is not to introduce the express revocation of prior deeds in the last deed, but to leave that deed to supersede the prior deeds. But if the estate is moveable, or if the deed last in date is in favour of the heir himself, the objection to express revocation of prior deeds does not arise. And, whether as regards moveable or heritable estate, if the last does not wholly supersede the former deeds, as well as in some other cases, a qualified revocation of the former may be expedient or necessary. For example, if the testator has been granting deeds of legacies, which the second or any subsequent deed is intended to supersede, there would be danger of both deeds receiving effect, and of double legacies becoming exigible, supposing no provision were made to the contrary. To prevent this result, there ought to be a conditional revocation of the prior deeds, whereby, in virtue of the testator's reserved powers, he declares those deeds revoked, if the last deed shall stand good and shall receive effect, otherwise the prior deeds to stand good and receive effect. By that course the heir's right of challenge will be excluded, as far as his interest to challenge was taken away by the prior deeds, and the risk of double legacies will be avoided.

We have seen that, in general, when the first deed has been revoked, it can be subsequently revived (if it has not previously been actually destroyed) by revoking the revocation. But, if the first deed was in prejudice of the heir, the revocation of it cannot be revoked on deathbed, so as to revive it, and rear up a deed on deathbed to the prejudice of the heir. In such case the testator is, as to this matter, in the same position as if he had executed no deed excluding his heir. The act of revocation of the revocation is thus a deed in prejudice of the heir, and so open to his challenge.²

The heir's challenge of testamentary deeds, on the ground of deathbed, extends not merely to dispositions of heritable property, to which by law he would succeed, but to gratuitous bonds, so far as these affect such heritable property;³ and even to gratuitous transferences of moveable rights, whereby the heir may be exposed to claims for payment to a greater or less extent of moveable debts of the deceased, on account of the deficiency of the moveable estate remaining untransferred to meet such moveable debts.⁴ But when the heritable estate was settled by marriage-contract in favour of the heir-male of the marriage, under reservation to the father of power, *etiam in articulo mortis*, of providing a sum for his younger children, it was decided by the House of Lords that a bond of provision in execution of the reserved faculty was not liable to the exception of deathbed at the instance of the heir who took the

¹ See on this point *Crawford*, 14th March 1806, 1 Ross's L. C. 617, and 2 Bligh's App. 655; *Moir*, 2d March 1820, F. C.; affirmed 1st March 1824, 2 Sh. App. 9.

² *Ker*, 16th Jan. 1851, 13 D. 492.

³ *Campbell*, 15th November 1757, M. 3232.

⁴ *Cowie*, 22d July 1707, M. 3220.

estate in virtue of the marriage-contract containing the reserved faculty.¹ And, where power to burden is reserved in a disposition in favour of the heir, such power may be exercised on deathbed, and the heir may be burdened, even though the words '*etiam in articulo mortis*' are not inserted in the reservation.² The disponent, though heir, and even though the disposition in his favour is in implement of a previous obligation in his marriage-contract, has accepted the disposition subject to the reserved power, and cannot object to its exercise. The father, moreover, can validly provide, on deathbed, a sum for the aliment of his younger children during their minority; because he lies under an obligation to maintain them, and the special provision in their favour is not gratuitous.³ He can also settle a jointure on his wife, not exceeding the legal terce, because such provision is considered the deed of the law.⁴

I formerly noticed the convenience of making the trust-disposition in one deed, and the directions for the disposal of the estate in a separate deed. And if the trust-deed contains reserved power of alteration, and is validly executed, and free of challenge as on deathbed, the relative directions will receive effect if they are probative according to the law of the testator's domicile. Thus, where the directions were contained in a testament, they were held as part of the trust-disposition, and allowed effect accordingly.⁵ Likewise, when by one domiciled in England, and in a deed in the English form, and not probative by the law of Scotland.⁶

Testamentary writings must be probative in themselves, or identified in probative writings of the testator as part of his will; and when not holograph they require to be authenticated by the subscription of the party, with all the usual solemnities necessary in the case of an ordinary deed.⁷ In the case of Dundas,⁸ a formal trust-deed directed payment of such legacies as the testator might leave 'by a writing under her hand,' and this was held to require a probative writing. A codicil subscribed by the party, but neither holograph nor tested, was disallowed.

But when a probative testament was granted, under burden of the payment 'of such bequests as I may instruct the executor to pay, in a letter signed by me of this date, to the several persons therein named,' etc., and when the deed so expressed was found in the testator's repositories, with a letter inside containing directions to the executor to pay certain legacies, and bearing the same date, and to be signed by the party, but which letter was neither holograph nor tested, the House of Lords, reversing the judgment of the Court of Session, held it competent to instruct the identity of the letter so found with that referred to in the will, so as to entitle the letter to legal effect, and remitted to have the

1.883

AUTHENTI-
CATION.

¹ Forbes, 11th Feb. 1755, M. 3277; reversed 29th January 1756, 2 Paton's App. 8.

² Dowglas, 22d June 1670, 2 Br. Sup. 147; Buchanan, Aug. 1758, M. 3285.

³ Erskine, iii. 8. 97.

⁴ Schaw, 21st Jan. 1668, M. 3196.

⁵ Willoch, 14th Dec. 1769, M. 5539.

⁶ Ker, 24th February 1829, 7 Sh. 454; Cameron, 19th May 1831, 9 Sh. 601; affirmed 29th August 1833, 7 Wil. & Sh. App. 106.

⁷ Crichton, 12th Jan. 1802, M. 15,952.

⁸ Dundas, 13th May 1807, Hume, 917.

fact of the identity proved.¹ The principle was here admitted, that a probative will might give efficacy to an improbate letter, by duly referring to it; and a decision on a similar principle will be found in another case.² In Buchan's case, the improbate letter of bequests was already written at the date of executing the probative settlement, and was specially referred to and identified as an individual document, therein described as bearing the same date with the settlement. But the Court have gone a step further in the same direction with that case. In a case where two sisters jointly executed a trust-settlement, they provided therein for the payment 'of all legacies which we may direct to be made, by letter or other writing under our respective hands, whether formal or informal.' It was held that a writing subsequently written and signed by one of the sisters, and also signed by the other, but not tested, was effectual to constitute a valid bequest of a legacy.³

NOTARIAL
EXECUTION.

On the subject of authentication, you will recollect that testaments can be validly executed on behalf of persons who cannot write, by one notary in presence of two witnesses; and that the minister of the parish in which the testator dwells, or, in his absence, the minister of another parish, can officiate as the notary—he, however, requiring to be authorized by the party, and to subscribe his own name and an attestation, exactly as an ordinary notary would do. The officiating notary or minister, however, ought to have no interest, either personal or fiduciary, under the deed. Interested parties are excluded from acting in the authentication of deeds in their own favour.⁴ Testaments, however, like other deeds, may be validated, after the testator's death, by homologation on the part of those entitled to object to them, or by *rei interventus*, though originally improbate.⁵

You will also recollect that, though pupils cannot competently make testaments, minors and married women can, and that of themselves, and without the consents requisite to the execution of deeds *inter vivos* on their part. Interdicted persons also can of themselves grant *mortis causa* deeds as to their moveable estate, and it is thought as to their heritable estate likewise. But you will recollect also that persons who are of capacity to understand and grant a simple deed may not be able to follow one that is complex in its provisions, or which contains involved technical clauses. On these points you may be referred to cases cited under a former branch of this Course.⁶ You may also be here reminded of the recommendation formerly given, that whenever the testator's intelligence is possibly open to question, on account of the state of his health, you

¹ Buchan, 27th May 1828, 6 Sh. 864; reversed 18th Oct. 1831, 5 Wil. & Sh. App. 785.

² M'Intyre, 1st March 1821, F. C.

³ Wilson, 13th Dec. 1861, 24 D. 163.

See further, as to the effect of a probative writing as giving efficacy to an improbate deed on which it was written, and to

which it bore express reference, Callander, 17th Dec. 1863, 2 Macph. 291.

⁴ Ferrie, 23d Jan. 1863, 1 Macph. 291.

⁵ Pollock, 20th Nov. 1849, 12 D. 143.

⁶ Watson, 18th Nov. 1825, 4 Sh. 200; affirmed 29th June 1827, 2 Wil. & Sh. App. 648; and Gillespie, 11th Feb. 1817, F. C. See *ante*, p. 118.

should consult with his medical attendant, and, if advised that there is capacity, endeavour to have the medical man as one of the attesting witnesses to the deed.

I have mentioned that in general the expression of the testator's purpose will receive effect, supposing always that in settlements of heri- EFFECT OF INSTRUCTIONS. tage there is a valid technical conveyance. The deed or writing, however, must express a completed will or purpose: the mere expression of an intention to make a deed of settlement, however distinct, is not equivalent to a deed. Thus, holograph signed instructions by a party to his agent for preparing a deed of settlement were found not to have the effect of a settlement.¹ And, where a testator had approved of drafts of new settlements making a variation on settlements previously executed, but died without executing the new deeds, the Court would not allow the drafts to be founded on, in order to control the previously executed deeds.² Indeed, a paper actually subscribed by a party as a codicil to his will, but sent to his agent as instructions for the preparation of a formal codicil, has been refused effect.³

On the other hand, a settlement, when once executed, is alone the evidence of the party's will and purpose; and the instructions for its preparation cannot be admitted to control the expression of the will, as contained in the formal deed.⁴ Blair's case shows the necessity of considering fully the import of instructions for a testamentary deed, and of care and technical accuracy in expressing them. According to the instructions, the testator intended to give the estate to A. B. and his eldest son. The words employed in the deed of settlement were—to A. B. and 'his heirs and successors;' and, the estate being chiefly moveable, the flexible term 'heirs' was held to mean heirs in moveable estate, as regarded that estate, and heirs in heritable estate as regarded heritage. The eldest son, therefore, was to a large extent disappointed.

The deed containing the revocation must be completed in order to be effectual. The intention to revoke will go for nothing, unless duly expressed in a probative writing. Thus, where the testator had asked his agent to send him his settlement, in order that he might cancel it, and through unintentional delay on the agent's part the deed was not sent, and remained uncanceled at the testator's death, the Court refused to reduce it.⁵

The case would be different if the party founding on the deed had prevented its being returned to the testator to be cancelled. Such party would not be allowed to take benefit under it.⁶ And where there is a clear revocation effect will be given to it, though the party's settlements may thereby become incomplete, so that he shall die partly testate and

¹ *Staintons*, 17th Jan. 1828, 6 Sh. 363.

² *Duguid*, 8th Feb. 1839, 1 D. 473.

³ *Munro*, 7th July 1813, 1 Dow's App. 437.

⁴ *Blair*, 16th Nov. 1849, 12 D. 97.

⁵ *Walkers*, 16th Dec. 1825, 4 Sh. 323.

⁶ *Buchanan*, 4th November 1704, M. 15,932.

partly intestate, and although the revocation may be contained in a deed not strictly testamentary.¹

ACCEPTANCE
OF OFFICE BY
TRUSTEES AND
EXECUTORS.

Assuming that the testator has validly named trustees or executors, the appointment by him requires to be accepted by the nominees, in order to be effectual; and it is very desirable that, as soon as possible after the testator's death, a probative acceptance should be obtained from all the nominees who agree to act, and a probative declinature from those who are not to act. The acceptance, and if convenient both the acceptance and declinature, should be indorsed on the testament or trust-deed; and the deed should immediately be registered for preservation, with the writings of acceptance and declinature upon it, if these can be timeously obtained.

Acceptance or declinature, however, can be proved by facts and circumstances, without a formal declaration on the subject. But acceptance or declinature is not to be presumed; and liability for loss of funds will not be incurred by mere knowledge of the existence of the trust-deed, attending the first meeting of the trustees, and writing the minutes,—the party expressly declining to give any opinion or vote, or incur any responsibility.² After a trustee has accepted, he must concur with his co-trustees, so far as requisite to enable them to perform such necessary acts in the administration of the estate as cannot be done without his concurrence.³

RESIGNATION
OF OFFICE.

In virtue of the powers in the Acts 24 & 25 Vict. cap. 84, sect. 1, and 26 & 27 Vict. cap. 15, trustees in trusts to which these Acts apply can resign the trust, unless the trust-deed expresses the contrary. Where the Acts do not apply, the rule is that trustees, after acceptance, cannot withdraw unless under very exceptional circumstances.⁴

But, independently of the Act, the general rule of the Common Law is subject to exceptions in special cases. Thus, when one of several trustees was absent from Scotland, and in bad health, he was allowed to resign, all concerned giving their consents.⁵ And one of three surviving and accepting trustees, under a trust-deed which did not specify any particular number as necessary to the management of the trust, was liberated from his office on account of delicate health.⁶ The Court, moreover, will supersede a trustee, when necessary for the security of the trust-funds. Thus, where a sole trustee had become bankrupt, he was interdicted from intromitting, and the Court appointed a judicial

¹ Lawrie's Trustees, 12th July 1843, 5 D. 1346.

² Mitchell, 20th Dec. 1855, 18 D. 284. The subject of the non-liability of trustees who have not concurred in acts out of which loss has arisen, is touched on in the case of the Bon Accord Marine Insurance Co., 11th Dec. 1850, 13 D. 295.

³ Lynedoch, 15th February 1827, 5 Sh. 358; affirmed 7th July 1830, 4 Wil. & Sh. App. 148. In a sequel to this case, the

recusant trustee was found liable for loss of interest arising by his refusal to act. Lynedoch, 11 Sh. 60.

⁴ This rule is exemplified by the cases of Carstairs, 20th January 1766, 2 Hailes, 678; Logan, 26th May 1843, 5 D. 1066; and Gordon, 2d June 1854, 16 D. 884.

⁵ Hill, 9th December 1846, 9 D. 239.

⁶ Dick's Trustees, 9th June 1855, 17 D. 835.

115.
See also the
trust Scotland
act- 1867
30. & 31. Vict.
c. 97

factor;¹ and where a sole trustee had acted so as to place himself in a position in which his duty as a trustee conflicted with his interests as an individual, and had failed (on the resignation of other trustees) to assume new trustees, the Court removed him and appointed a judicial factor.² In the case of Barry,³ two of three trustees having become insolvent, and the circumstances being such as to excite distrust, the Court ordered them to find caution; and upon their failing to do so sequestrated the trust-estate and appointed a judicial factor. In another case, where the nomination was of three trustees, and the survivors and survivor, one having died and one having become insane, the third applied to the Court for powers to himself alone to bring the trust to a conclusion, 'the period when this ought to be done having arrived.' Authority was granted accordingly, but only upon caution being found.⁴

I have assumed that the trustees have not all declined to accept. When that case happens, the Court usually name a judicial factor to execute the trust; but they have in some instances, on the application of all concerned, appointed trustees with survivorship, and all the powers given by the testator to the trustees whom he named;⁵ and they have made a new nomination when the trustees have all died.⁶ But trustees appointed by the Court must find caution; the power to dispense with security for intromissions being peculiar to the case of an absolute proprietor. And, when one of three trustees named by the Court with a survivorship died, the Court refused to name a new trustee in his place so as to make up the number again to three, on the ground that such appointment was unnecessary.⁷ The Court will also, on the application of parties interested, name a judicial factor on the estate of a party deceased, when it is alleged that a trust-deed was executed, but has been destroyed. But when the trust deed, in such case, shall have been restored by decree in an action of proving the tenor, and one or more of the trustees thereby named shall have declared their acceptance of the trust, the appointment of the judicial factor will be recalled as no longer necessary. The Court will also name a judicial factor when all the trustees die, or become incapable to act, before the purposes of the trust have been fulfilled.⁸ And, as we have seen, they will name such factor, although all the trustees are not actually deceased, when the appointment appears necessary for the protection of the estate. The factor, in all cases, must find caution before he can enter on the execution of his office.

The appointments in the cases before referred to were made by the Court *ex nobili officio*. But now, by the Bankrupt Act of 1856,⁹ sect.

¹ Smith, 15th May 1832, 10 Sh. 531.

² Fleming, 30th May 1863, 1 Macph. 850.

³ Barry, 11th March 1847, 9 D. 917.

⁴ Fraser, 1st March 1837, 15 Sh. 692.

⁵ See Melville, 8th Feb. 1838, 16 Sh. 457; affirmed in respect of the consent of

the parties, 29th March 1841, 2 Robinson's App. 45.

⁶ M'Aalan, 17th July 1841, 3 D. 1263.

⁷ Hay and Others, Sir R. Preston's Trustees—not reported.

⁸ Dick, 22d Jan. 1758, M. 16,206.

⁹ 19 & 20 Vict. c. 79.

164, power is given to persons interested as creditors of parties deceased to a specified amount, or having an interest in the succession of such parties, where the deceased has not left a trust-settlement, or where the trustees named are not accepting or acting, to apply by summary petition to either Division of the Court for the appointment of a judicial factor, whom the Court are thereupon authorized to appoint. This enactment will apply in several cases, such as those before specified. It was held by a majority of the First Division to authorize the appointment of a factor in a case of intestacy, on the application of parties interested both as creditors and as representatives.¹ In M'Farlane's case, a sale of heritage was stated to be indispensable; but, the heirs-at-law being in minority, a factor was required in order to sell and give a title. The appointment directed the judicial factor to call, by notice in the Gazette, at the distance of not less than fourteen days, a meeting of the creditors of the deceased, to receive their instructions as to the realization of the funds; declaring the appointment subject to such conditions as to caution and otherwise as should be contained in any relative Act of Sederunt. And the Court intimated that, as in such cases application was competent at the instance of parties having a very inconsiderable interest in an estate, they would not adopt the party suggested by the petitioner as the factor, but would make inquiry for themselves and act thereupon.

CODICIL.

A codicil is a testamentary writing which supposes a previous *mortis causâ* deed to have been already executed by the maker of the codicil, and which makes alterations thereon by way of addition, suppression, qualification, or otherwise. Its most common use is to grant new bequests, or to revoke bequests made by the previous deed. The rules of construction applicable to codicils are the same as those in the case of other *mortis causâ* writings; and, whilst the codicil can be revoked or destroyed without the previous deed being thereby invalidated, the revocation or destruction of the previous deed will, as a general rule, annul the codicil.

In construing testamentary writings, the rule to be followed is thus laid down by Lord Corehouse :²—‘It is an invariable rule that testamentary deeds shall receive the most liberal interpretation, and that which carries the presumed intention of the testator into effect.’ But the object of every appointment which a Court can recognise must be agreeable to law; and testators cannot legally direct the accumulation of the annual proceeds of their estate for a longer time than twenty-one years after their death, or during the minority or respective minorities of a person or persons living at the time of the testator's death. This was

¹ M'Farlane, 6th March 1857, 19 D. 656.

² Hyslop, 11th February 1834, 12 Sh. 416.

enacted, as to personal property in Scotland, by the Act commonly called the Thelusson Act;¹ and the rule was extended to heritable property in Scotland by the Entail Amendment Act.² The Thelusson Act was applied in the case of Lawson,³ where the testator had given directions to accumulate the income of his personal property for a hundred years in order to erect an hospital; and again, as to the accumulations of moveable estate in Scotland, in the case of Keith's Trustees.⁴ But it was found not applicable to heritable property in Scotland in the case of Strathmore.⁵ That decision was pronounced before the passing of the Entail Amendment Act, which Act, in the case of Keith's Trustees, was found not retrospective in its operation.

The purposes of the settlement must also be rational, intelligible, and workable. Lord Elchies reports the case of Macculloch as 'a question of reducing two most ridiculous entails and trust-rights, whereby, excepting a small aliment to the heir, the rents were to be applied for many years for purchasing other estates, and entailing them in the same manner. We all agreed to reduce the whole deeds.' That case appears to have involved also the question of deathbed.⁶

CHAPTER II.

BEFORE entering further on questions of construction of testamentary LEGACIES. deeds, I shall notice the subject of Legacies.

A legacy is the bequest of a sum of money, or moveable subject, to be paid or delivered to the legatee out of the estate of the testator. Legacies may be contained in any testamentary writing; and what I have to observe in connexion with them will apply whether they occur in proper testaments, codicils, or testamentary writings of any other kind.

In speaking of legacies, I will consider—

- (1.) The different kinds of legacies.
- (2.) Questions relative to their vesting; and
- (3.) The substitutions under which they may be granted.

(1.) Legacies may be distinguished as universal, general, and special.

A universal legacy is the bequest or conveyance of the *universitas* UNIVERSAL LEGACY. or whole free moveable estate of the testator; which, however, will not without some speciality in its terms include heirship moveables, that is, the moveables to which the testator's heir in heritage is entitled, in

¹ 39 & 40 Geo. III. c. 98.

² 11 & 12 Vict. c. 36, s. 41.

³ Lawson, 18th July 1846, 8 D. 1229.

⁴ Keith's Trustees, 17th July 1857, 19 D. 1040.

⁵ Strathmore, 16th Feb. 1830, 8 Sh. 530; affirmed 23d March 1831, 5 Wil. & Sh. 170.

⁶ Macculloch, 28th Nov. 1752; Elchies' Notes, Tailzie, No. 48.

order that he may not succeed to a house and lands completely dis-
 plenished. And, when the grantee gets his legacy or conveyance bur-
 dened with the payment of legacies to others, he is said to be residuary
 legatee. The words to be used in making a universal legacy are of
 critical importance ; but on that point I need do little more than refer
 to what was before said on the subject of the terms to be employed in
 defining the estate or effects conveyed by a testamentary disposition,
 intended to embrace the *universitas* of the testator's moveable estate.¹ I
 may notice, however, that a bequest of 'all my plate, and horses, and
 moveables whatsoever, and all pay, and arrears of pay,' was held not to
 include a bond for borrowed money.² And I apprehend that a general
 liferent of estate will not necessarily give right to the liferent use of
 furniture, and other perishable effects, which are consumed in using, but
 may give only the liferent use of their price or value on the sale thereof ;
 and that, in order to give a good right to use such effects, the grant
 of liferent must show that the use of the effects, and not the income
 arising from their price, was intended to be given.

GENERAL
 LEGACY.

A general legacy (called by the Romans *legatum quantitatis*) is the
 bequest of a certain sum of money, to be paid out of the testator's estate,
 but not having any particular fund specified, out of which the payment
 is to be made. It does not, therefore, give the legatee a *jus in re*, or
 real right, in any debt or subject belonging to the testator, out of which
 to make good the legacy, but only a right of action against the executor,
 who is bound to pay if he has a sufficiency of free funds arising from
 the testator's estate, after satisfying debts and other preferable claims.
 But if the free funds will not pay the legacy in full the legatee will
 draw only the net amount of the funds, and if there are several general
 legatees their claims will suffer abatement in proportion to the amount
 of their legacies.³

SPECIAL
 LEGACY.

A special legacy, again, is the bequest of a particular debt or move-
 able, or set of moveables, so specified as to be distinguished from the
 rest of the testator's moveable estate. A bequest of this nature gives
 the legatee a *jus in re* or real right ; supposing the debt or subject
 bequeathed to belong to the testator at the time of his death. The
 legacy, in that case, operates as a special conveyance, giving the legatee
 right to demand the very sum or subject bequeathed, with right of
 action against the deceased's debtor, if the subject be a debt, or against
 the holder of the article, if it be a moveable, for payment or delivery
 the case may be.⁴ In Gray's case, the executor was found not entitled
 to do diligence for a bond bequeathed to a special legatee.

In case of prosecuting for the special legacy, the legatee must call
 the executor as a party for his interest ; because, possibly, the subject
 of the legacy may be required, in whole or in part, to satisfy the

¹ See *ante*, p. 867, *et seq.*

² Dunbar's Trustees, 15th Jan. 1808,
 Hume, 267.

³ Erskine, iii. 9. 11.

⁴ Gray, 27th Dec. 1711, M. 8062.

testator's debts. If, however, the general funds are sufficient to pay the debts, the special legacy is not liable to be appropriated, even if general legacies remain unpaid.¹ Moreover, the settlement of the free proceeds of certain estates upon a particular individual in *liferent* was held to be a special legacy, and not liable to be encroached on for answering annuities made payable out of the testator's funds generally, but for meeting which the testator had left sufficiency of general funds.²

But as, on the one hand, the claim of the special legatee is not affected by the deficiency of general funds, so, on the other hand, it is liable to be evacuated by the subject of the special legacy perishing, or being sold or extinguished, or ceasing to exist. In such case the legatee will have no claim on the general fund, unless the special subject has perished through the fault of the executor.³ Moreover, the special legacy of a personal bond is evacuated, if the testator shall afterwards take a heritable bond for the same debt: he will thereby make the debt heritable, and will be held to have revoked the legacy, the grant of which is appropriate to personal estate only, unless he shall expressly direct that the legatee is to have the bond notwithstanding.⁴ The evacuation may be prevented also by a declaration that, if the subject of the legacy shall be extinguished, the legatee shall have a claim for the amount on the testator's estate. If, however, the legacy comes to depend on such a declaration, the special will thereby be converted into a general legacy.

I may here notice two other kinds of legacies, viz., the *legatum liberationis* and *legatum rei alienæ*, both of which partake of the nature of the special legacy. The first of these is the bequest of a debt, or of all the debts which the legatee may be owing to the testator at the time of his death. And the effect of it is to free the legatee of the debt, or of all the debts (as the case may be) arising from loans made to him by the deceased, and owing by him to the deceased at the time of his death; but not of sums held by the legatee as depositary on account of, or as trustee for, the deceased.⁵

The *legatum rei alienæ* is the bequest of something which belongs to another. If the testator knew that the subject of the bequest was not his own, the bequest operates to the effect of obliging the executor to make it good. But if the testator supposed (erroneously) that it was his own, when it was not, the bequest falls to the ground; because it is not supposed that the testator would have burdened his representative, had he known himself not to be proprietor.⁴

A legacy of heritage belonging to the testator himself, but not properly transmissible by testament, will also receive effect, provided there

¹ Erskine, iii. 9. 12.

² Breadalbane Trustees, 26th May 1842, 4 D. 1259.

³ Jack, 27th June 1742, M. 11,357; Plomer, 26th January 1838, 16 Sh. 383;

Chalmers, 19th Nov. 1851, 14 D. 57; Paul, 5th July 1821, 1 Sh. 100.

⁴ Erskine, iii. 9. 10.

⁵ Graham, 22d June 1792, M. 8108 and Bell's 4to Cases, 302

is clear evidence that the testator, though he used an inhabilé mode, really meant to convey the heritage; and further, provided the legacy is claimed from a party taking benefit by the deed devising the legacy, or so connected or bound to connect himself with that deed that he must give effect to its whole scope and intention.¹

Legacies, like other testamentary grants, are subject to revocation by the testator at any time of his life; but a special legacy is not presumed to be revoked by the granting of a posterior general disposition and settlement of the testator's property. The general conveyance is presumed to be granted under the burden or exception of the special legacy.² All these peculiarities should be kept in view, and communicated to a testator, when he proposes to grant a special legacy, that he may make corresponding provision if he thinks fit.

In framing testamentary deeds, it is necessary to be careful to describe legatees correctly and sufficiently; when effects are bequeathed, to identify them fully; and generally to see that the testator's purpose is free of uncertainty. As regards all these points, the rule will be followed by the Court of giving effect to the testator's intention, as far as it can be gathered from the deed; and, in reference to the legatee, it is enough *drummodo constet de personâ*. A legacy to a married woman was sustained, although both her Christian name and married name were erroneously given; the Court being satisfied, in the circumstances, that no other person could be intended.³ Again, where the bequest by a party who had been insolvent, and was discharged on payment of a composition, was made 'to all my creditors, of whatever sums shall be necessary for making up full payment of the balances remaining due to them, as the same shall be set forth in a list which I intend to leave,'—the bequest did not fall for want of the list.⁴ And when the testator said, 'Any money left after paying all expenses I wish may be laid out on charities,' and then bequeathed a legacy to her nephew 'with power to see this will executed,' it was held that the bequest was not void through uncertainty; that the term 'charities' was sufficiently expressive of the objects of her bounty; and that a power of selecting the particular objects, and distributing among them, was conferred on the executor.⁵ In this case, a direction that plate and furniture should be 'divided equally' was held to mean equally among the deceased's next-of-kin.

As regards the subject or amount of the legacy, the briefest expression of the testator's intention will make an effectual legacy, if sufficiently explicit. We have an illustration of this rule, both as to what will be

¹ This point was formerly explained, and I need not again cite the authorities. See *ante*, pp. 869, 870.

² Thomson, 18th Nov. 1836, 15 Sh. 32.

³ Keiller, 15th Dec. 1824, 3 Sh. 396.

⁴ Sprot, 12th June 1855, 17 D. 840.

⁵ Dundas, 27th Jan. 1837, 15 Sh. 427. A question somewhat similar was decided in favour of the bequest in Kelland, 28th Nov. 1863, 2 Macph. 150.

sufficient, and what will not, in the case of Panton.¹ The testator there left a trust-settlement for payment of debts and legacies; and, on her death, sundry bills and bank deposit-receipts were found in her desk, with two documents, one of which was in these terms:—'1820.—The bill within this paper you will give £100 to Miss Jane Panton; £50 to Janet Martin, my servant; £5 to my girly, Kitty Martin, to receive after my death.' This document was holograph of the testator, and signed by her; but, although bills were lying near it, none of them was attached to it; and the document was found inoperative. The other document was in these terms:—'*September* 15, 1820.—The bill within this paper you give Miss Panton £100; Janet Martin, my servant, £100; to Kitty, my girly, £5. The is more if Miss Mackie's serve be with at time, let have the remaining £3.' This was signed with a second date:—'*Belfield, Oct. 26, 1821*;' and, with the exception of the words, 'the remaining £3,' and '*Belfield, Oct. 26, 1821*,' the document was holograph of the testator. It was found pinned to a bank deposit-receipt, dated 15th September 1821, for £208, being the exact amount of the sums bequeathed by the document; and the Court unanimously held the document as giving the parties named right to the sum in the deposit-receipt.

In another case, the testator had constituted a general donee, under burden of paying all legacies he might thereafter appoint to be paid, by writing under his hand however informal. Thereafter, in a letter addressed to a third party, he bequeathed a legacy, payable out of a sum which he described as being in a certain bank. There was no such sum in that bank at the date of the letter; but shortly afterwards the amount was paid to the bank, where it remained till the testator's death. The legacy was held to be due.²

In these cases particular sums deposited or placed in bank were found to have been duly bequeathed, under the circumstances which have been explained. But you will observe that the claims of the legatees did not depend on any destination in their favour contained in the *deposit-receipts*. These claims arose under separate memoranda or instructions granted by the testators, which were held as applicable to the sums in the deposit-receipts, and as directing the disposal thereof after the testator's death. In the case of Cuthil,³ an opinion was expressed by Lord Benholme, and concurred in by the other Judges of the Second Division of the Court, that a deposit-receipt by a bank, acknowledging the receipt of a sum of money from a husband and wife, and declaring the same 'payable to the longest liver of them,' could not operate as a legacy or gift of the sums deposited to the wife in the event of her survivance. The opinion that it could do so would involve 'the supposition that the deposit-receipt, which is neither holograph of, nor 'subscribed by,' the deceased, 'but is a printed form, the written part

¹ Panton, 22d January 1824, 2 Sh. 632.

² Melvin, 20th May 1824, 3 Sh. 31.

³ Cuthil, 20th March 1862, 24 D. 849.

'of which is filled up in the hand of the bank officials, could operate as 'the will or testament' of the deceased. This view their Lordships could not adopt. But where the deceased had deposited money in a bank, on a deposit-receipt taken in name of his brother-in-law, who received from him the deposit-receipt, and uplifted the contents a few days after the depositor's death; the Court held that, in the whole circumstances, and there being no allegation that the sum was deposited, or the receipt held, for any other purpose or on any other footing, the transaction was to be viewed as a donation by the deceased to his brother-in-law.¹

DOUBLE.
LEGACIES.

In construing testamentary deeds, a difficulty frequently arises, whether two or more legacies to the same individual are intended as additional or substitutional. In a case where the testator desired that £200 should be laid out, the interest of which should be yearly paid to his reputed daughter, and that, in the case of her marrying with the consent of his executors and other friends, £100 should be paid and secured for her portion,—the £100 was held to be due, besides the interest of the £200.² And the application of the doctrine, that the testator's intention is the rule of construction, will be found anxiously carried out in a case in which fourteen instances of ambiguity in bequests were settled by the Court in accordance with the presumed intention of the testator.³

CONDITIO SI
SINE LIBERIS.

It is on the same principle—viz., of presumed intention—that, in the construction of a testamentary or *mortis causâ* deed granted when the testator has no children, the condition *si sine liberis decesserit* is, as a general rule, allowed to operate in favour of a child born to the testator after the execution of the deed, as a ground for reducing a deed granted in favour of a third party. That principle operates with peculiar force when pleaded by the child in reference to a deed embracing the whole of the testator's estate. It is almost impossible to suppose that total disinheritance of a child born after the execution of the deed is intended. Accordingly, when the settlement in favour of the third party was of the testator's whole estate, and the father survived the birth of the child only a few weeks, reduction was sustained at the instance of the child.⁴ But the deed would appear not to be rendered null by the birth of the child. The deed would seem only to be reducible at the instance of the child; and where the reduction was brought at the instance of the next-of-kin of a posthumous child, who had died when only a few months old, the deed was sustained;⁵ and where a party, having taken bonds payable to himself, whom failing to his brother, thereafter married and had children, whose birth he survived for two years,—it was held that, by not altering the destination of the bonds, he

¹ Kennedy, 8th July 1863, 1 Macph. 1042.

² Sutherland, 22d November 1825, 4 Sh. 220.

³ Horsbrugh, 12th Jan. 1847, 9 D. 329.

⁴ Colquhoun, 5th June 1829, 7 Sh. 709.

⁵ Watt, 30th July 1760, M. 6401.

showed his intention of preferring his brother to his children, to the extent of the sum in the bonds.¹ In other words, he was held to have left a special legacy of the bonds to his brother, notwithstanding his marriage and the birth of his children. It must, however, take a very strong case to authorize the claim under the deed, as against the testator's own children. Lord Glenlee says the intention to prefer the stranger must be made 'as plain as a pike-staff' But it is in general a good rule to express the condition in the testament, and leave no room for doubt on a point so important; and certainly it is most unusual in destining a bond to any substitute to omit calling first the heirs of the body of the institute. If the institute wishes to prefer any third party to his own children, he can do so by a separate writing.

The intention of the testator operates not only as the rule of construction applicable to bequests, but to regulate the disposal of any legacy, or portion of an estate, which a party shall forfeit by repudiating the general settlement of the testator. Thus, where the testator conveyed to trustees the whole estate, heritable and moveable, which should belong to him at the time of his death; and directed his trustees 'to pay over the 'free rents of his unentailed lands to his two daughters, equally between 'them, and to the survivor of them;' and one of the daughters claimed her legitim, and thereby forfeited her interest in the bequest of the rents of the unentailed lands, such interest was held to fall to the trust-estate, as compensation *pro tanto* for the legitim drawn therefrom in opposition to the testator's will.² And when the testator conveyed the *universitas* of his estate, heritable and moveable, to three children, declaring the share of any one who should challenge his will to be forfeited; and one of the children, being the heir-at-law, reduced the disposition as regarded the heritable property, and so forfeited his third share of the moveable estate; the forfeited share of the moveable estate was not held to be intestate succession, and as such to fall to the next-of-kin of the deceased. It accresced to the disponees other than the heir-at-law; such accretion being necessary, by way of compensation *pro tanto* to them, to give effect, as nearly as might be, to the testator's will and intention in their favour.³ But it is well that testamentary deeds should make special provision for the right of accretion in such cases, by saying that, if any child shall repudiate the settlement, the share which would have fallen to him in virtue thereof shall accresce to the other beneficiaries, as a *surrogatum* for what is taken from them by the repudiation.

A legacy cannot be made verbally for any sum beyond £100 Scots; VERBAL LEGACIES. because no obligation for a larger sum can be proved without writing. But where it can be proved, by the oath of the party beneficially entitled to the estate, that he promised to the deceased to make payment of legacies to certain persons, such persons will have a good claim against him

¹ Yule, 20th Dec. 758, M. 6400.

² Nisbet's Trustees, 6th Dec. 1851, 14

³ Breadalbane's Trustees, 15th January D. 146.
841, 3 D. 357.

for such legacies, although the amount shall exceed £100 Scots.¹ But the oath of an executor, who is not also residuary legatee, can have no such effect. Such executor is just a third party.² A verbal legacy, however, for a larger sum than £100 Scots, will be good to the amount of that sum, if the legatee choose so to restrict his claim;³ and, where a verbal legacy of £10 had been actually paid by the executor, the Court sustained the payment to the extent of £8, 6s. 8d., apparently without any act of restriction on the part of the legatee.⁴

VESTING OF
LEGACIES.

(2.) We next consider the vesting of legacies, and the effect of conditions in the grants of legacies. The intention of the party, as expressed in his deed, is the *regula regulans* in all such questions. But it may be stated as the general rule in regard to vesting, that a legacy payable unconditionally vests on the death of the testator, in a legatee who survives him, and is transmissible to the representatives or assignees of the legatee, although he shall die before the term of payment has come.

Such a case frequently happens where legacies are left to one in life-rent and another in fee. Lord Corehouse says as to that case,⁵ 'When a legacy is left to one person in life-rent, and another in fee, the subsistence of the life-rent does not prevent the fee from vesting at the death of the testator; and the rule appears to be the same when a fund is conveyed by the testator to trustees, with directions to pay the interest to one person during his life, and the capital to another at the life-renter's decease. At least this is the rule when there is a destination of the fee to an individual simply, and no ulterior substitutions which require the trust to be kept up for the benefit of those substitutes.' In Maxwell's case there was a trust.⁶

There are various cases, however, in which, notwithstanding the legatee's survivance of the testator, the vesting of legacies may not take place, or may be for a time suspended.

1. When conditions are expressly attached to the grant of a legacy, these must be purified in order to complete the legatee's right. Thus, where the testator named trustees, and requested each of 'my said trustees' to accept £500 as a mark of friendship, and the further sum of £105 as a recompense for 'trouble in the management of my affairs, and as a further testimony of my affection for them,' and where one of the persons named as trustees declined to accept the trust,—the legacy of £105 was not even claimed by him,—the other legacy was, by a majority of the Court, held to be due; Lord Gillies strongly objecting, in respect of a parallel English case, in which both of the legacies for friendship and for trouble were annulled, because the party had not clothed himself with the character of trustee.⁷

¹ Hannah's Legatees, 17th June 1738, M. 3837, & 5 Br. Sup. 203; reported also by Lord Elchies, under the title of *Phin v. Guthrie*, 15th June 1738, *voce* Legacy, No. 5.

² Forsyth's Trustees, 18th Jan. 1854, 16 D. 343.

³ Wallace, 7th July 1629, M. 1350.

⁴ Kelly, 8th March 1861, 23 D. 703.

⁵ Maxwell, 25th May 1837, 15 Sh. 1005.

⁶ See also Turnbull, 28th July 1778, M. 8099. This was a case of simple bequest to one in life-rent, and others in fee.

⁷ Henderson, 13th Dec. 1825, 4 Sh. 306.

2. Again, when the legacy was made payable to A. during her life, *VESTING*, and at her death was to be equally divided between the testator's two nieces, or the survivor of them, and when one niece predeceased and the other survived the liferenter,—under the words of the bequest, it was held that the predeceaser had no vested right, and that the whole legacy fell to the survivor.¹

3. In another case the legacy was bequeathed in a mutual deed of settlement. It was to bear interest from the first term after the death of the survivor of the testators, but was not payable for two years after that event. There was also a declaration, that in case the legatee, who was a female, should die before the survivor of the testators, the legacy should fall to her executors or next-of-kin. The legatee survived the one and predeceased the other testator; and it was held, looking to the whole deed, that the legacy did not vest, and was not transmissible by the legatee, but belonged to her next-of-kin as conditional institutea.² But when the legacy in the mutual deed was granted simply to the legatee, and was payable at the death of the longest liver of the testators, without any contingent destination to next-of-kin as above, the Court, after much difficulty, and by a small majority, held that it had vested by the legatee surviving one of the testators, though he predeceased the other.³

And, when the legacy is payable absolutely, it will in general vest on the death of the testator, although it may not be payable, or may not authorize any demand for payment, till the death of some other person also. Thus, where a legacy was payable after the decease of the longest liver of the testator and his wife, it was held to have vested by the legatee surviving the testator, and to be due to the legatee's representatives, though he died before the testator's wife.⁴

The presumption in favour of vesting is strengthened when the legacy bears interest during the period between the testator's death and the term of payment.⁵ The Lord Justice-Clerk Boyle said, in Johns' case, 'There is a provision here for payment of the interest, and it is not the case of a common conditional legacy. Looking at the whole deed, I am satisfied that it was in the contemplation of the testator to give A. B. and his representatives this legacy,' etc. 'It is likewise favourable to vesting when there is a direction to make an interim payment at a certain term to the legatees, and when they have right also to the yearly produce of the balance, after satisfying an annuity payable from the estate, although such balance is not payable to them till the annuitant's death.'⁶ In Watson's case, it was held that the balance vested in those who survived the term fixed for making the interim payment, and did not lapse by their predeceasing the annuitant.

¹ Newton, 27th Jan. 1849, 11 D. 452.

² Lawson, 24th Jan. 1826, 4 Sh. 384.

³ Nicolson, 16th Dec. 1806, M. App. Legacy, No. 2.

⁴ Wallace, 28th Jan. 1807, M. App.

Clause No. 6. The case of Sterling, 12th Nov. 1851, 14 D. 20, was decided on the same principles, being almost parallel.

⁵ Johns, 29th Nov. 1833, 12 Sh. 146.

⁶ Watson, 3d June 1856, 18 D. 971.

The power of testing upon or assigning the legacy, although the term of payment is postponed, is also of great importance in favour of the presumption of vesting *a morte testatoris*.¹ It is also important in the question of vesting if personal obligations are appointed to be granted by the legatee in certain events. It is not to be supposed that the testator would direct a legatee to undertake such obligations, without intending that he should have a vested right as the consideration and counterpart.²

But where the bequest is contingent on an event which may happen within a limited time, and the existence of which will wholly annul the bequest, the vesting appears not to take place till the time limited has expired without the occurrence of the contingency. Thus, where the testator left his estate to trustees, to hold for his sisters and their heirs, in case they should appear and claim within five years from his death; failing which, to hold for certain other persons in liferent and fee respectively; and neither the sisters nor their heirs appeared,—the right was held not to vest in the eventual legatees till after the expiration of the five years; and a liferenter, who died before expiry of that term, was held to have no right in the annual proceeds which arose prior to her death.³ And, when the legacy is made absolutely to depend on the will of another, it appears to confer no vested right, unless that other shall give conclusive directions, or shall do some other act which shall entitle the legatee to compel payment.⁴

The principle of *dies incertus pro conditione habetur* may also affect the vesting, when the term of payment is a day or event which may or may not happen; for example, the majority or marriage of the legatee. Whenever the uncertainty appears to be meant as a condition attaching to the grant of the legacy, the arrival of the day or event named must take place, otherwise the legacy will lapse. But the intention of the party is still the rule; and where payment is ordered at an uncertain time stated merely *as a time*, and not as a condition of the grant,—in other words, if it appears that an absolute bequest, with merely a postponed term of payment, was meant,—the legacy will be held to vest *a morte testatoris*, and will transmit to the representatives of the legatee, although he shall die before the term of payment arrives. A leading case in which the uncertainty was held as a condition attaching to the grant, and in which the legacy was held not to have vested, is that of *Omey*.⁵ Here the fact that the legacy was to a grandchild appears to have weighed; and you will recollect that a decision somewhat similar was pronounced in reference to a provision to a grandchild in the case of *Bells*.⁶ A leading case on the other side is that of *Burnets*.⁷ Here a legacy was bequeathed to A. B., 'to be paid when he is sixteen years

¹ Clark, 5th Dec. 1851, 14 D. 141.

² Newbigging, 9th March 1853, 15 D. 489; affirmed 10th May 1855, 2 Macq. App. 273.

³ Stevenson, 30th June 1826, 4 Sh. 776.

⁴ Burnside, 11th June 1829, 7 Sh. 735; Sempills, 15th Nov. 1792, M. 8108.

⁵ Omey, 19th Nov. 1788, M. 6340.

⁶ Bells, 1st Feb. 1749, M. 6332.

⁷ Burnets, 9th Dec. 1783, M. 8105.

of age ;' and it was held that the mention of the legatee's age was meant **VESTING**. merely to regulate the term of payment of the legacy, not as a condition of the grant.

When trustees are interposed, a material question in connexion with **TRUSTEES**. that of vesting is, whether their appointment was intended for the management of the fund until the legatee is of a competent age to manage for himself, or whether the trustees were named for the security and benefit of conditional institutes, or for substitutes, or for the residuary legatee, in case the general legatee and institute should die before the term of payment. In the former case, the managers being for the legatee, their appointment does not operate against vesting as at the death of the testator.¹

The cases of Wilson² and Halbert³ may also be referred to in connexion with this point. In Halbert's case there is a valuable summary by Lord President M'Neill of particulars which are important, and of others which are unimportant, as bearing upon the pleas that legacies have or have not vested.

But when there is a trust for one in *liferent* (or substantially in *liferent*), and the fee, after the termination of the life-interest, is to be given to other parties who cannot until then be ascertained, the rule as to vesting appears to be different. In the case of Provan,⁴ the testator conveyed his whole estate to trustees, with directions, *inter alia*, to pay an annuity to his niece during her lifetime. For securing the annuity, they were to lay out a capital sum in their own names, and, after the annuitant's death, to uplift and divide the capital among her children equally,—the share of any who had predeceased, leaving issue, to fall to such issue. The Court held the intention of the testator to be that vesting should not take place till the death of the annuitant.⁵

The examination of these cases, and of numerous others quoted in them, will show very clearly that, whilst the rule of construction is universally admitted to be the intention of the testator as gathered from his deed, the application of the rule is exceedingly difficult, and often affected by considerations of a very minute and critical description.

The Lord Justice-Clerk Boyle says, in Provan's case :—' Every case ' of this kind must depend on the special phraseology of the deed. We ' must look at it as a whole, and consider its provisions, in order to ' ascertain the will of the testator. This is the only rule of law a Court ' can follow in such questions. I have difficulty in thinking that there ' is a principle established by any decision, or series of decisions, on ' the subject. We are bound to give effect to the will of the testator, ' whatever it is.'

The opinion of the Lord President, in Halbert's case, is well calcu-

¹ Wood, 2d July 1813, Hume 271 ; and Ralston, 8th July 1842, 4 D. 1496.

² Wilson, 9th July 1842, 4 D. 1503.

³ Halbert, 26th March 1853, 15 D. 609.

⁴ Provan, 14th Jan. 1840, 2 D. 298.

⁵ A similar decision was pronounced in the exactly parallel case of Johnston, 9th June 1840, 2 D. 1038.

lated to point out the difficulties, and likewise the general principles of solution, so far as there are any such applicable to cases of this description. In that case there was a trust, with directions to pay the interest of a share of the residuary estate to the testator's niece, and at her death the capital sum to her daughter. The daughter predeceased her mother; and it was found that the fee of the residue had vested in the daughter, and was not intestate succession. Referring to the general rules applicable to such cases, his Lordship says:—'For instance, it is said that 'there is no distinct estate of liferent and fee given to the parties, and 'that this shows that the trust was to subsist until the capital sum or 'share was paid to the children of the nephews and nieces named. 'Then another circumstance looked to is the trust itself. A trust is the 'machinery by which the party accomplishes an object; and it may operate as a suspension of vesting, but it cannot exclude vesting. Then, 'not giving an ulterior interest is another element; for where ulterior interests are given, and a trust exists, then there the trust is looked to 'as intended for the purpose of preserving the ulterior interest. Then 'there are cases where interests are given to a class of persons, and not 'to an individual *nominatim*. I observe that, in some of the cases, and 'particularly the case of Johnston, that element was dwelt on as important.' (The 'class of persons' in this case was the children of a sister of the testator and her husband.) 'The absence of it may make it more 'clear that the testator did not mean vesting; but I have never myself 'looked much to that element, for I think it is just a short way of expressing a number of individuals.

'Now what have we here? In the first place, we have a trust. That element exists. It is consistent certainly with the suspending of vesting, but is not conclusive against it.

'In the second place, there is no distinct estate of liferent and fee given in express terms.

'But, in the third place, I think there is what is so, in substance and effect, as between mother and children. There are separate interests given, distinguishing between the interest of the fund, during the mother's life, and the capital.

'In the fourth place, no other person is named or alluded to who had or could have any interest in this estate than the liferentrix and her children.

'In the fifth place, we have the fact that the money is only to be paid at the death of the mother; but that has never been held of much importance in such questions.'

The legacy was accordingly held to have vested in that case.

LEGACY FAILS
WHEN LEGATEE
PREDECEASES
TESTATOR.

We have seen that, in general, a legacy vests if the legatee survives the testator. On the other hand, it is clear that by the legatee's predecease of the testator the legacy lapses.¹ The bequest proceeds from favour to the legatee personally; and, if he is not to be benefited, the

¹ Rutherford, 30th May 1821, 1 Sh. 37.

testator is supposed to prefer his own heirs to the heirs of the legatee, excepting in those instances where the *conditio si sine liberis decesserit* comes into operation. But if the legacy, in place of being bequeathed simply to A., is bequeathed to A. and his heirs or executors, the predecease of A. does not cause lapsing. He can transmit nothing to heirs or assignees, nor will his creditors have any claim upon the legacy, because he himself had no right. The legacy falls to his heirs, not as representing him, but as conditional institutes, and in their own right,—the condition of the grant to them being the predecease of A. These principles are illustrated by many cases.¹

The same holds when the testament declares that, in the event of the decease of one of several legatees, his legacy is to fall to the survivors. The survivors take as conditional institutes, supposing the *conditio si sine liberis* not to operate.² And it would confer no transmissible right upon the intended legatee to make the legacy to him and his heirs or assignees. In case of his predecease, the legacy would fall to his next-of-kin or heirs in moveables, as conditional institutes, and not to his executors-nominate or assignees of any kind. The use of the word 'assignees' in such case would be held applicable to the assignees of the legatee after his own right had become vested. At all events, the use of that term cannot give the intended legatee the power to assign a right which never becomes vested in himself.³ And even if the legatee survives the testator, and acquires a vested right, an assignation of the bequest granted by the legatee during the testator's lifetime will not be available to exclude an arrestment of the legacy used after the testator's death. Before the testator's death the legatee had nothing to assign.⁴

But a qualification in regard to lapsing arises when the legatees are children or other descendants of the testator. In these cases there is the presumption that the legacy proceeds from the *pietas paterna*; and effect is, in general, allowed to the implied condition *si sine liberis decesserit*, giving the legacy to the issue of the predeceasing legatee, even if there is a substitution to a third party.⁵ It makes no difference that at the time the bequest was made the legatee had children, of whom the bequest takes no notice. Where a testator by his deeds of settlement granted provisions to all his children, and in several instances gave the right to them and their heirs expressly, in the others gave no express right to the heirs, a difficulty has arisen in consequence of this difference. But it has been overruled, particularly in the case of Dixon.⁶ This, however, was a very strong case for the children. The

¹ See particularly Inglis, 16th July 1760, M. 8084; Boston, 13th Feb. 1781, M. 8099; Henry, 19th Feb. 1824, 2 Sh. 725; Fyffe, 13th July 1841, 3 D. 1205; & Glendinning, 30th Nov. 1825, 4 Sh. 237.

² Dunlop, 2d June 1812, F. C.

³ Graham, 17th Feb. 1807, M. App. voce Legacy, No. 3.

VOL. II.

⁴ Bedwells, 2 Dec. 1819, F. C.

⁵ A leading case on this point is that of the Magistrates of Montrose, 21st Nov. 1738, M. 6398; see also Neilson, 4th June 1822, 1 Sh. 458; and Wilkie, 9th July 1836, 14 Sh. 1121.

⁶ Dixon, 10th June 1836, 14 Sh. 938; affirmed 9th Feb. 1841, 2 Robinson's App. 1.

same qualification has, for some time, been extended to the case of legacies granted to collateral relatives, or even to those who, though connected by blood, are, in the eye of law, strangers,—when the legacies are granted to such parties respectively as a class.¹ The residue of the testator's estate was bequeathed, in Wallace's case, to the children of a nephew who should be alive at the decease of the longest liver of the testator and his wife, the share of any child who should die before the bequest became payable falling (so far as unpaid) to the survivors of said children: in Christie's case, the bequest was in favour of the testator's cousins by the mother's side who should be in life at the time of the testator's death. One of the children in Wallace's case predeceased the testator's wife, leaving issue; and one of the cousins in Christie's predeceased the testator, leaving issue;—and in both cases the issue were preferred to the share which would have fallen to their parents if they had survived. But if the legacy, though left to several persons, whether related to the testator or not, is bequeathed to the legatees individually, and not as a class, the rule on the point now under consideration appears to be different. The *conditio si sine liberis* will not be allowed to operate. The share, left to one of such persons individually who shall predecease the testator, of a bequest left to him and the others individually, will not fall to the children of the predeceaser, but will lapse.²

I may here notice the case of a bequest in favour of two persons. In such case, if the words used are 'to A. and B. jointly,' each will take a half if both survive the testator. But the legacy is bequeathed to both, and if one predeceases and the other survives, the survivor takes the whole.³ But if the words employed are, 'to A. and B. equally between them,' or 'one-half to each,' although the result will be the same if both survive, yet, on the other hand, if one predeceases, the survivor will take only a half,—the other half will lapse.⁴ These results ought to be pointed out to a testator, in any case of legacy to two or more parties, so that his intention may be duly expressed.

SUBSTITUTIONS
IN LEGACIES.

(3.) We have now to consider the effect of substitutions in the grants of legacies. A substitution is that form of destination by which the right is made to devolve upon a certain person, failing the institute or him to whom the legacy has been bequeathed in the first instance. A regular substitution is accordingly denoted by the words 'whom failing;' as thus, 'I leave to A. B., whom failing, to C. D.,' etc., though the words 'whom failing' are not absolutely necessary to make a substitution. In the case of legacies a simple substitution,—for example, a direct grant to A., whom failing to B.,—operates nothing in favour of the substitute if the

¹ See the cases of Wallace before referred to, and Christie, 5th July 1822, 1 Sh. 543.

² Hamilton, 8th Feb. 1837, 16 Sh. 478. The rules as to the operation of the above condition are very fully discussed in this case.

³ Stair, iii. 8. 27; Tulloch, 23d Nov. 1838, 1 D. 94.

⁴ Paterson, 4th June 1741, M. 8070; Rose, 12th Jan. 1782, M. 8101; and Torrie, 31st May 1832, 10 Sh. 597.

institute survives the term of vesting, or, in certain cases, if he leaves issue who survive that term. By the survivance, the full right to the legacy vests in and belongs to the institute, and after his death falls not to the substitute, but to the heirs or assignees of the institute, just as if there had been no substitution. This rule is strongly illustrated by the case of *Fyffe*,¹ already cited, where a legacy bequeathed with a substitution became vested in the institute, who was insane, and was held upon his death to fall under a settlement executed by him whilst in sound mind, and not to devolve upon the substitute legatee named by the testator.

We have a case of proper substitution created by a trust, where the Trust. trustees were directed by the testator, after the death of his widow, and in case of the failure of his children, to pay the residue to certain of his brothers and sisters. The testator was survived by one of his children, who died in pupillarity before actual payment of the funds took place; and the substitutes were preferred to the funds in preference to the next-of-kin of the child.²

But the trust must be special, and intended for the benefit of the substitutes, in case the institute should die before the period of payment. In the case of *Williamson*³ it was found that the mere appointment by the testator of executors of his will, generally, does not constitute a trust effectual to prevent the legacy from vesting in the person first called. The same was found in the case of *Alexander*,⁴ in which the necessity of a special and permanent trust was more fully discussed. The order, there, was to lodge the bequest on a heritable bond, or in the public Funds, that the legatee might receive the interest during all the days of her life, and her children to be her heirs. The legatee was held to be *fieri*, and the children only substitutes. And in regard to a legacy, equally as in the case of the conveyance of land, the grant to a parent in *liferent*, and to his children *nascituri* in fee,—or to a parent in *liferent*, and his children born (but not named) and to be born in fee,—operates to bestow the fee upon the parent absolutely, and to give the children a mere *spes successionis*.⁵

A few general remarks only appear necessary in closing this subject. The interest of a legatee or beneficiary under a trust-settlement is transmissible by him as soon as his right becomes vested, although the property continues to be held by the trustees; and the beneficiary may transmit by a *mortis causâ* deed, as well as by one *inter vivos*.⁶ And, although the estate out of which the legacy is to be paid consists of lands, a feudal conveyance of the legacy is not necessary nor appropriate. The right of the beneficiary consists of a claim upon the trustees; and an assignation, as of a debt or *jus crediti*, is the proper mode in which to transfer such right. The assignation requires to be followed

¹ *Fyffe*, 13th July 1841, 3 D. 1205.

² *Annandale*, 9th June 1847, 9 D. 1201.

³ *Williamson*, 28th June 1828, 6 Sh. 1035.

⁴ *Alexander*, 13th Dec. 1849, 12 D. 345.

⁵ *Ferguson's Trustees*, 13th July 1860, 22 D. 1442; affirmed 18th July 1862, 4 Macq. App. 387.

⁶ *Gordon's Trustees*, 4th Dec. 1821, 1 Sh. 185.

by intimation to the trustees.¹ And, even when the property held by the trustees is heritable, any general interest of a beneficiary under the trust is attachable by arrestment in the hands of the trustees, and furthcoming against them; not by inhibition and adjudication against the beneficiary. The right of the beneficiary is a claim upon the trustees, not to any particular part of the estate, but to a sum or payment generally out of the estate.² But if the trustees hold a particular heritable subject, which they are bound to make over to a certain beneficiary, and the right to which subject is vested in him, I apprehend that his right is in the subject, and heritable, and ought to be attached by inhibition or adjudication: arrestment and furthcoming also may be employed, *ob majorem cautelam*. And if a creditor of the legatee should raise adjudication, in order to attach the subject for payment of his debt, the subject is by the action made litigious; and this affects the nature of the diligence suited to attach the property. The proper diligence for attachment of the property in such cases would be inhibition on the dependence.³

**DISCHARGE BY
LEGATEE.**

Legatees having right to legacies of specific amount are not bound, on receiving payment, to grant a formal discharge in favour of the trustees or others making payment, or to pay *ad valorem* fees, as for such a discharge, to the agent of the party making payment. A simple receipt by the legatee for the legacy is all that can be required. The case of residuary legatees is different.⁴

The framing of trust settlements is a very anxious and difficult department of professional duty, as the cases before cited abundantly show. The great point always is to exhibit clearly and distinctly the testator's concluded will and intention. Caution is necessary, however, in the use of terms which have a definite or accustomed signification; for, though the intention is what is sought for, and deeds may be expressed so as to overrule the ordinary import of such terms, the Court will not narrow the application of rules of interpretation already adopted, without the clearest evidence that the usual interpretation is not to be given. In general, the employment of plain ordinary language will best obviate doubt. I recommend particularly, however, that on the question of vesting the deed should always be explicit. The testator's views ought to be ascertained regarding the contingent rights to arise, in case of the failure of the legatees whom he, in the first place, prefers; and if it is wished that a legacy or residuary estate, with a distant term of payment, shall vest, or shall not vest, before the legatee's majority, or before any other event which the testator may have in view, the necessary clause ought to be introduced in the deed. If the event, for instance, is majority, the words may be 'which legacy shall not vest in the said A. B. till he shall attain majority.' Care must also be taken, however, not to declare the legacy or estate payable or available to the

¹ Macdowall, 6th Feb. 1824, 2 Sh. 682.

² Grierson, 25th Feb. 1780, M. 759.

³ Wilson, 31st May 1809, F. C.

⁴ Fleming, 6th Feb. 1861, 23 D. 443.

legatee or beneficiary before the term of vesting actually arrives. And though we have seen that the issue of a predeceasing legatee will, in some cases, take the legacy intended for their parent, if he had survived, that point also should be placed beyond question, and the deed should be expressed so as to favour the issue, unless the testator shall direct their exclusion. It is also very common to exclude the *jus mariti* in the interests of daughters' portions; and, if the daughter is unmarried at the time, to direct the trustees to see her portion secured to her in alimentary liferent, and her children in fee, in case of her marriage.

CHAPTER III.

WE have now to consider the mode of completing titles in the persons of trustees or judicial factors. Executors, testamentary dis-
ponees, and judicial factors ought, as soon as possible after their appointment, to complete titles in their persons to the estate conveyed to them, or over which their powers extend.

COMPLETION
OF TITLE BY
TRUSTEES AND
JUDICIAL
FACTORS.

In regard to the moveable estate, so far as the executors or trustees
can obtain actual possession, their title is complete in virtue of the testament or other deed in their favour; so far also as such estate shall have been specially conveyed, their title will be complete, except when intimation, registration, or entry in the books of a joint-stock company is necessary, as in the case of personal bonds, patent rights, stocks and shares, etc. These steps, when required from the nature of the subject, or the terms of the conveyance in favour of the trustees, must be taken by the testamentary assignees like other assignees. It is to be observed, however, that a general conveyance of the testator's whole estate, such estate consisting for the most part of the residue of his father's estate, held by his father's trustees, and vested in him (the son) as his father's residuary legatee, though fully intimated to the father's trustees, does not transfer the estate from the son to his (the son's) executors.¹

MOVEABLES.

As to all the deceased's moveable estate not specially conveyed by him to his trustees, or of which actual possession is not obtained by them, they must complete their title by confirmation; a process which will be more fully explained hereafter. Confirmation, which is a public judicial proceeding, completes the title without intimation.

In reference to the heritable estate, a general disposition, whether
contained in an ordinary disposition and settlement, or in a trust-deed, is a sufficient title to bonds secluding executors;² also to leases; but, in agricultural or mineral leases of ordinary endurance, possession must

HERITAGE.

¹ Smith, 27th June 1862, 24 D. 1142.

² Grant, July 1718, M. 14,377.

ASSIGNATION
TO WRITS.

follow in order to make the right real. To leases which have been recorded under the Leases Registration Act, the title must be made up as provided by the Act. This point will be afterwards considered when we are on the subject of leases. In the case of lands, or other proper heritable estate, the procedure depends on the state of the title in the person of the deceased. If he had merely a personal right, in virtue of a disposition not registered, or with procuratory of resignation or precept of sasine unexecuted, the disposition and settlement, or trust-disposition, though containing only a general conveyance of the testator's lands, with general assignation to the writs, operates a valid transfer of the personal right; and it authorizes the testamentary disponee to obtain infeftment in feudal subjects either by resignation or confirmation, in virtue of the unexecuted procuratory or precept,—or in burgage subjects, in virtue of the unexecuted procuratory,—in favour of the deceased, and of the general disposition and assignation of writs;¹ or, in virtue of the Titles Acts, the disponee can proceed in either of the modes pointed out in section 14 of the Act of 1858 as to feudal, and section 10 of the Act of 1860 as to burgage subjects; and that although the disposition in favour of the deceased contained no procuratory of resignation or precept of sasine. I do not think it has yet been decided that a general disposition of the lands, when not accompanied by an assignation of writs, is sufficient to convey an unexecuted procuratory or precept; and, as to that question, a disposition without procuratory or precept would be in the same situation now as one without procuratory or precept was before the passing of the Titles Acts. I believe that practice, to some extent, supports the view that the disposition of the lands carries the writs, though there is no assignation of writs; and I think there are reasonable grounds for holding the conveyance good, though not accompanied by the assignation. I know, however, that a title offered to a purchaser was questioned, on the ground that a general disposition of all lands belonging to the testator at the time of his death was not enough without the assignation to writs; and that, on a reference, eminent counsel decided that it was not such a title as a purchaser was bound to accept. Adjudication in implement of the general conveyance, and a feudal title following thereon, were therefore ordered, as being necessary to satisfy the purchaser.

As regards lands in which the testator had a real right, if there is only a general disposition, that is, a disposition without a particular or a statutory description of lands, the disponee can expedite a notarial instrument in virtue of the Titles Acts of 1858, sect. 12, and 1860, sect. 8. And, unless there is a prohibition against subinfeudation or alternative holding in the titles, it is not now necessary to obtain confirmation from the superior as to feudal subjects, even if the general disposition does not contain an *a me vel de me* holding. This result arises from the Act of 1860, sect. 36.

¹ Melvin, 17th June 1843, 5 D. 1217.

If there is a particular or a statutory description of lands, the donee can register the deed with warrant of registration in usual form, or obtain infeftment by resignation or confirmation as to feudal, or by resignation as to burgage subjects, if the deed contains the requisite executive clauses. Before the passing of the Titles Acts, the procedure when there were not such clauses was different, according as the donee was the testator's heir *alioqui successurus* or not. If he was the heir, he could pass over the deed as a title, and make up titles in the character of heir under the prior investiture. But if he was a stranger, he could proceed only by adjudication in implement against the heir of the prior investiture. The decree of adjudication was the warrant (as to feudal subjects) of a charter of adjudication in implement from the superior, on which infeftment followed; and as to burgage subjects the decree was the warrant of an instrument of resignation and sasine. Now the donee, having a conveyance with particular or statutory description of lands, can obtain the equivalent to infeftment without any executive clauses, by simply registering the conveyance with the usual warrant thereon.

In regard to heritable securities, whether over feudal or burgage subjects, general donees or trustees, under deeds *mortis causa*, will make up their titles in the way pointed out in the Heritable Securities Act of 1845.¹ If the deed is *inter vivos*, the Titles Act of 1858, sect. 12, authorizes the general donee, in the case of securities over feudal subjects, and the Act of 1860, sect. 8, authorizes him in the case of securities over burgage subjects, to expedite and record a notarial instrument, with the same effect as if he had obtained and recorded a special assignation from the grantor of the general disposition.

Judicial factors on trust estates, not being the representatives of any living party in whose person a title to the estate stands, or of any party in whom a title can be completed, require to make up titles in their own persons, equally with trustees, before they can transact as in the full right of the estate under their management. And they require to apply to the Junior Lord Ordinary for authority to make up titles, which his Lordship will grant on cause shown; but he will not direct as to the procedure to be adopted. As regards moveables of which judicial factors obtain actual possession, their title is complete by such possession. When they are factors on the estate of a person deceased, and to whose estate no title has been made up since his death, they will complete their title to the moveable estate by confirmation as executors-dative, an office which will be conferred on them on application to the Commissary Court.² In the same case, that is, when they are factors on the estate of a party deceased, and to whose estate no title has been made up, the Titles Act of 1858, sect. 21, introduced a new mode of proceeding in reference to lands not held burgage.

¹ 8 & 9 Vict. c. 31.

² Act of Sederunt, 13th Feb. 1730, s. 7.

WHEN TITLE IN
DECEASED.

Formerly the factor proceeded, in such cases, by adjudication against the heir-at-law, or, if there was a disputed intestate succession, against all those claiming to be heirs-at-law. And, if the deceased left a trust-settlement, which the factor was to execute, he adjudged in implement thereof, preceding his adjudication with an action and decree of constitution, just as the trustees would have had to do if they had accepted. Supposing the case to be one of simple intestacy, there would be no preliminary constitution; and the adjudication of course would not be in implement. The title at the period in question was completed, as to feudal subjects, by charter from the superior and sasine; the charter following on the decree of adjudication, and containing a confirmation of the deceased's infeftment if that was a base right; as to burgage subjects, the title was completed by resignation and sasine following on the decree. The procedure as to burgage subjects remained as before, until the Act of 1860 came into operation.

But in the case supposed, that is, of the factor on the estate of a party deceased, to whose estate no title had been made up, sect. 21 of the Titles Act of 1858 introduced a new mode of proceeding in reference to feudal subjects. The factor had to obtain the Court's authority to make up his title; and the Act provided that where he should apply by petition for authority to complete a title, and where the petition should specify the lands to which the title was to be made up, the act and warrant of the Court should likewise specify the lands to which the title was to be made up; and such warrant should have the legal operation and effect of a disposition of the lands in favour of the factor from the party whose estate is under judicial management,—that is, the truster or intestate,—to be holden in the same manner as such party held or might have held the same.

In such cases, therefore, and as to proper feudal subjects, the factor, after obtaining the act and warrant of the Court authorizing him to complete titles, could proceed as we have seen to be competent in the case of the testamentary disponee under a disposition with particular or statutory description. The act and warrant authorizing the completion of titles was equivalent to a special disposition of the feudal subjects specified in it in favour of the factor. But he required to obtain confirmation from the superior, if he used the act and warrant as equivalent to a conveyance of feudal subjects from a party infeft. As such conveyance, the act and warrant had merely an *a me* holding, and the title under it was defeasible until confirmed.

Where the deceased had a personal right only, the decree of adjudication gave, and the act and warrant of Court now gives, good right to dispositions of feudal subjects; and the factor could complete his title as in the case of a party having right by ordinary disposition and assignation. The decree, or act and warrant, would be of itself a good title to bonds secluding executors, and to leases. But where the title, as at the date of the judicial factor's appointment, was not in the person of

the party whose estate was under judicial management, the enactment of 1858 did not apply even in the case of feudal subjects; for example, where a trust-deed had been granted, and the trustees had completed a title in their persons, and had all died. In such cases, no doubt, the act and warrant of the Court was equivalent, as to feudal subjects, to a conveyance from the party whose estate was under judicial management,—that is, in the case supposed, the truster; but the title to the lands had been transferred from the truster to his trustees. A conveyance from the truster himself, therefore, would not have been effectual to give the factor a title. What he wanted was a conveyance from the trustees, or an equivalent.

In such cases—that is, the cases to which, on the principles now explained, the Act of 1858 did not apply, and likewise in all cases of burgage lands—it was necessary for the factor to proceed by adjudication against the party in whom the title stood, or the heir of such party, if he himself were dead. If the title was in trustees who had all resigned, the adjudication would be led against them; and under the Lands Transference Act of 1847,¹ the decree of adjudication would be equivalent to a disposition of feudal subjects, with *a me vel de me* holding; the registration of which, with warrant of registration in due form, would give the factor a real right. As to burgage subjects, the decree of adjudication was the warrant of an instrument of resignation and sasine in favour of the factor. If the title was in trustees who had all died, the adjudication would be led against the heir of the last survivor. Where the deceased trustees had a real right, the factor's title, after the decree of adjudication was obtained, would be completed as to burgage subjects by instrument of resignation and sasine as before; as to feudal subjects, by charter of adjudication and registration thereof, with warrant of registration in usual form; for even as to feudal subjects registration of the decree of adjudication with warrant thereon would not in this case answer. The Titles Act of 1858, sect. 27, made decrees of adjudication against apparent heirs, on account of their ancestor's debt or obligation, or on account of their own debt or obligation, equivalent to dispositions with *a me* holding, but it went no further. It did not include all adjudications; and the adjudication we are here considering was not led against an heir, on account of either his ancestor's or his own debt or obligation. It was what is called a declaratory adjudication, partaking more of the declarator than the adjudication. Its object is simply to give the factor the means of obtaining a title. Accordingly, it does not adjudge the lands from the heir. There is nothing in the heir to be adjudged from him. The deceased held merely as a trustee; and his right died with himself, and did not descend to, nor could it have been taken up by, his heir *quod* such. The heir, indeed, is not a defender in the action, in the ordinary sense of the term. He is only called as a party. The case of this adjudication, therefore, does not fall under the

WHEN TITLE IN
TRUSTEES.

DECLARATORY
ADJUDICATION.

¹ 10 & 11 Vict. c. 48, s. 19.

provisions of the Act of 1858; and, as has been said, the decree of adjudication, though in a certain sense led against the heir, must be followed as to feudal subjects by charter of adjudication and registration thereof, sasine being also competent if the charter contains a precept.

MOVEABLES.

In the case we are considering, of an estate to which trustees have made up titles, the judicial factor's title to moveables, of which possession has been obtained, will be completed by the possession. As to moveables to which the trustees had not made up titles by the judicial process of confirmation, the factor will himself confirm; and when the trustees had expedite confirmation, but had not actually got in the estate confirmed, the factor can expedite confirmation *ad non executam*, which will give him a good title.

HERITABLE SECURITIES.

With respect to heritable securities, the judicial factor required as to feudal subjects, before the Titles Act of 1858, and as to burgage subjects, before the Act of 1860 came into operation, to obtain decree of adjudication, just as in the case of proper lands; and his title was completed by recording the abbreviate of the decree of adjudication in the appropriate register of sasines.¹ In the case of securities over feudal subjects, if the title was not in the person of the party whose estate was under judicial management, the Titles Act of 1858 did not apply, any more than in the case of proper feudal subjects so situated themselves.

But where the title was in the person of the party in question the Act did apply both to the securities over feudal subjects and to proper feudal subjects themselves. And, if the petition for authority to make up the title specifies the securities, the act and warrant would also specify the same; and the act and warrant would be equivalent to an assignation of the securities, by the party whose estate was under judicial management, in favour of the judicial factor; and the registration of the act and warrant in the appropriate register of sasines would complete his title.

TITLES ACT OF 1860.

The clause in the Act of 1858, as to the mode in which judicial factors might make up their titles, was very limited in its operation. But by the Act of 1860, sect. 38, the warrant for completing titles, granted on petition by a judicial factor, with the petition specifying the lands to which such title is to be completed, is to be held as a disposition of the lands, and an assignation of the heritable securities contained in such warrant, in due and usual form, in favour of the judicial factor, granted by the person, whether in life or deceased, whose estate is under judicial management; and where such judicial factor has been appointed on a trust-estate which shall have been vested in a trustee, or former judicial factor, the warrant is to be held as a disposition and assignation foresaid granted by such trustee or former factor, whether in life or deceased, for the purposes of the trust.

¹ 8 & 9 Vict. c. 31, s. 3.

This new enactment is applicable to all lands, whether or not held by burgage tenure, as well as to heritable securities. And it is not limited in its application, like the clause of the Act of 1858, in favour of judicial factors. On the contrary, it operates to convey the lands or the securities from the person in whom they were last vested, whether alive or dead, to the judicial factor, and enables him to complete titles by registration of the act and warrant, or notarial instrument thereon, just as if he had obtained a disposition of lands and assignation of heritable securities. Confirmation from the superior will, of course, be necessary for the completion of the title to lands as to which there is a prohibition against subinfeudation or alternative holding in the investitures.

The parties, however, in whom the lands specified in the judicial factor's petition were last vested, may have objections against the summary investiture of the judicial factor in the lands; or they may have claims which ought to be satisfied or secured before the factor is invested. For example, trustees may lawfully have made advances for the trust-estate, trusting to work out their payment during the subsistence of their office. For enabling parties interested to bring forward objections or claims, the new enactment appoints such intimation of the petition to be made as the Court shall think proper; and, as matter of course, the Court will order intimation to trustees, factors, or others last vested, or their representatives, for enabling them to state objections or claims.

The case of a curator *bonis* is different from that of a judicial factor, as regards the necessity for titles in his person. The party under curatory has a title; or a title can be made up in his person; and the curator, as representing him, has the benefit of such title, very much as in the case of an ordinary factor or commissioner.¹

On the termination of the trust, the trustee must denude of the estate in favour of the beneficiaries.² The beneficiaries, on the other hand, are bound to grant a discharge and exoneration in favour of the trustees;—a full accounting, of course, taking place, which the beneficiaries in right of the fee of the property, or their representatives, are entitled to call for.³ As a general rule, trustees are not bound to denude until their intrusions are approved of, or to accept a discharge qualified by reservations.⁴ The judicial factor must also denude; but, being an officer of Court, he will obtain his discharge from the Court, on application for that purpose.

The deed of denuding will be a disposition or assignation, or as the

¹ See Scott, 21st Feb. 1856, 18 D. 624.

² Allan, 25th May 1791; Bell's Octavo Cases, 538.

³ Home, 27th May 1712, Robertson's App. 47.

⁴ Edmond, 16th Nov. 1860, 23 D. 21.

case may require, proceeding on the narrative of the trust-deed and the fulfilment of its primary purposes, and of the right of the ultimate beneficiary to the residue of the estate. It will then contain a conveyance to that beneficiary, and the heirs (if any) appointed by the trust-deed to be substituted to him, generally of the whole estate held by the trustees in virtue of the trust-deed, or to which they have right as trustees, and specially of all the lands, debts, heritable and moveable, and other estate; burdening the disponees personally with the payment of debts and fulfilment of obligations, if any shall afterwards appear to affect the estate: and the deed will contain all the usual clauses of a special disposition of lands, and special assignation of moveable estate; the warrandice being from fact and deed only. The registration clause (if there are heritable bonds) will be for publication as well as preservation. It may often, however, be convenient to have separate deeds of conveyance from the trustees to the beneficiary,—one applicable to proper land estate, and another to debts and other estate of a less permanent character.

The title of the beneficiary should be completed by registration, sasine, or intimation, as the case may require.

**DISCHARGE BY
BENEFICIARY.**

The discharge and exoneration by the beneficiary to the trustees will proceed on the same narrative as the deed of denuding; and, in consideration of the fulfilment of the primary purposes of the trust and conveyance of the residue, the beneficiary will ratify all the past management of the trustees, and discharge and exoner them and the representatives of deceased trustees of all their actings and intromissions. There is sometimes added an exoneration of all omissions, if there are any, which can be laid to their charge. The beneficiary will, moreover, bind himself to relieve the trustees and all others concerned of all claims of whatever kind that can be made against them *quod* trustees, or the trust-estate, and will grant absolute warrandice of the discharge.

In reference to this final settlement, it may be important that the trustees and beneficiary should be represented by separate agents,—their interests being adverse; and, when the same party usually acts for them both, he should get one or other of the parties to place themselves in the hands of a separate agent as regards that particular business. Such a proceeding will be a great security against opening up the settlement.

**DECLARATORY
ADJUDICATION
BY BENEFICI-
ARY.**

When all the purposes of a trust are wound up, except the conveyance of the residue to the person entitled to it, the Court will not name a factor merely to convey the estate to the beneficiary, though all the trustees happen to have died, because that can be accomplished in a different and more simple way. The course of proceeding in such case is for the beneficiary to bring an action of declarator and adjudication into the Court of Session, calling the heir of the last surviving trustee, or of the factor, as the case may be, as a party to the action. The action libels the fulfilment of the trust-purposes, and the pursuer's own right as

beneficiary, and concludes that the trust-estate shall be adjudged to him, and that the superiors of feudal subjects included in it shall be ordained to grant him charters in usual and proper form. Decree in this action is a conveyance of the lands adjudged in favour of the beneficiary; but I need here only refer to the explanation already given with respect to the effect and peculiarities of this decree as a conveyance and title to lands, as well under the old as the new systems, when the decree is obtained by a judicial factor.¹ In a feudal sense, the decree of declarator and adjudication operates in the same way in both cases.

The decree of declarator and adjudication is necessary when the trust-deed contains no destination to the heirs of the last survivor of the trustees;² and it may be the only course, even when there is such destination. Because the heir of the last surviving trustee, though he may agree to make up titles, and grant the required conveyance, if he is of full age, and so disposed, may be under age, or otherwise incapacitated, or may not choose, and he cannot be compelled, to undertake the duties of the trust.³ As already explained, there is no occasion in this case to precede the adjudication by an action of constitution against the heir of the last trustee, even if the trust contained a destination in favour of such heir, and the heir is competent to act.⁴

¹ See *ante*, p. 929.

² Drummond, 30th June 1758, M. 16,206.

³ Dalziell, 11th March 1756, M. 16,204.

⁴ See Dalziell's case. Crawford, 22d

May 1838, 16 Sh. 1017; Gillespie, 11th

March 1824, 2 Sh. 795.

TITLE IV.

ENTAILS AND DISENTAILS.

CHAPTER I.

AN entail, as the term is now generally applied, is a deed of conveyance of land, limiting the right of succession to a particular series of heirs, and restraining these heirs from alienating or burdening the estate, or from altering the prescribed order of succession. But, in a large sense, the term 'entail' or 'taillie' (derived from the French word '*tailler*,' to cut) is any deed by which the course of succession established by law is cut off, and an arbitrary line substituted.

SIMPLE DESTINATIONS.

DESTINATIONS WITH PROHIBITIONS.

STRICT ENTAILS.

Entails, in the more comprehensive sense of the word, were formerly of three distinct classes—(1.) Those containing only the appointment of the arbitrary line of heirs, but without imposing any restraints on these heirs. Such deeds were technically called 'simple destinations.' (2.) Those containing the appointment of heirs as above, with clauses prohibiting the heirs from altering the order of succession, and from alienating or burdening the estate, or from doing any one or more of these acts; but without irritant and resolute clauses. These were called 'destinations with prohibitions.' And (3.) Those containing the appointment of heirs; clauses prohibiting alteration of the order of succession, and alienating or burdening the estate; and clauses irritant and resolute; the former (the irritant clause) declaring all acts and deeds in contravention of the prohibitions to be void and null, and the latter (the resolute clause) declaring that upon and by the contravention the right of the contravening heir should cease and be forfeited, as if such heir had never existed. These last were called 'strict entails.'

1. Deeds of the first class are those earliest in use. They operate to call to the succession the heirs named therein in their order, so long as that order remains unaltered. But each heir in possession for the time is proprietor and fiar of the estate, and, being placed under no prohibition or restraint, he can alter the order of succession, and dispose of or burden the estate, either for onerous causes or gratuitously.

2. Deeds of the second class—entails or destinations with prohibitions—come next in order in point of history. They had the effect, until the passing of the Entail Amendment Act of 1848, of disabling the heir in possession from doing any gratuitous act in contravention of the prohibitions; but he was *fiar* of the estate, and could for onerous causes deal with it without regard to the prohibitions. Such deeds were thus effectual only *inter hæredes*. There was no clause of irritancy, declaring acts done or deeds granted in contravention of the prohibitions to be null; and, the faculty of granting such deeds being the common right of every proprietor, the want of the irritant clause was of itself a sufficient ground on which to protect onerous deeds from challenge, though in contravention of the prohibitions.

With a view to make the prohibitions effectual against third parties, the lawyers of the seventeenth century, particularly Sir Thomas Hope, the Lord Advocate of King Charles the First, devised the addition of both irritant and resolute clauses to the prohibitions. In his *Minor Practicks*,¹ Sir Thomas Hope observes that each heir is *fiar*, and that every *fiar* may dispoise his own lands, except he be lawfully restrained; much more, that the lands may be comprised, that is, carried off by legal diligence; he then says, 'But, to prevent and remeid this, there is a new form found out, which has these two branches, viz., either to make the party contracter of the debt to incur the loss and tinsel of his right, in favour of the next in tailzie'—(that is the resolute clause), 'or to declare all deeds done in prejudice of the tailzie, by bond, contract, infestment, or comprising, to be null of the law'—(that is the irritant clause). Sir Thomas then goes on to argue as to the efficacy of tailzies with these combined clauses, and comes to the conclusion, that, except against the Crown in cases of forfeiture for treason, or against the superior who had not recognised the entail, they would, in combination, be effectual against the heirs, as conditions of their right, and against creditors-comprisers, because they cannot have the right *nisi cum sua conditione et causa*.

Sir Thomas Hope, however, had considerable difficulty and misgiving on this subject; and the effect of the clauses was for a long time matter of doubt and discussion amongst the lawyers of the day. The point was at length brought before the Court of Session in the case of the Viscount Stormonth.² The entail here contained prohibitory and resolute clauses, and an irritant clause striking only against the infestment of the contravener, not against writs or infestments flowing from him. These clauses were all engrossed *verbatim* in the sasine on the entail; and (the report says) 'the matter being at great length debated, from law, practice, and reason, the Court found the resolute clause effectual against singular successors, especially considering it was so public and *verbatim* in the sasine, and that it was equivalent to an interdiction.' The judgment in this case, however, was pronounced by a narrow majority; and the landed interest—a great feudal aristocracy—being anxious that

¹ Hope's *Minor Practicks*, p. 403.

² Stormonth, Feb. 1662, M. 13,994.

1685, c. 22. the power of making effectual entails should be placed beyond all doubt, the Act 1685, cap. 22, was passed, declaring it lawful to His Majesty's subjects to tailzie their lands and estates, and to burden the heirs with such conditions as the entailers should think fit, and to affect the entails with irritant and resolute clauses, so as to restrain the heirs from selling, alienating, or disposing the lands, or contracting debts, or doing any other deed by which they might be apprised, adjudged, or evicted from the substitutes in the tailzie, or the succession frustrated or interrupted. All such deeds are by the Act declared null; and the next heir is declared entitled, upon contravention, to take up the estate. The Statute required that the irritant and resolute clauses should be inserted in the procuratories of resignation, charters, precepts and instruments of sasine relating to the lands; and a register was appointed to be kept, wherein should be recorded the essential parts of the deed of tailzie. It was further declared, that the omission to repeat the provisions and irritant clauses in the rights and conveyances of the lands should import a contravention against the person guilty of the omission and his heirs, but should not affect creditors or other singular successors contracting *in bond fide* with the person infeft in the lands.

3. This Statute, prepared by Sir George Mackenzie, may be said to bring us to entails of the third class; for, notwithstanding the views expressed by Sir Thomas Hope, and the decision in the Stormonth case, the opinion of lawyers certainly is, that at Common Law, and as against third parties, the rights of property could not validly have been restrained or affected as they now may be by entails, and that the Statute was indispensable to give efficacy to the strict entail.¹

ENTAIL AMEND-
MENT ACT.

Entails continued on the footing of this Statute, subject to modifications of no very substantial consequence, until the year 1848, when the Entail Amendment or Rutherfurd Act² was passed, introducing very important, and in some respects fundamental, alterations on the law of entail. Under the old law, an entail, when validly framed and perfected in terms of the Act of 1685, could not be brought to a termination until all the heirs of entail thereby called should become extinct. The consent of all the heirs existing for the time was not enough to authorize the heir in possession to dispose of the estate. The Act of 1848 gave power to the heir in possession to terminate the entail on obtaining the consents of a certain number—never exceeding three—of the heirs next entitled for the time to succeed in their order. It likewise regulated the form of future entails, and gave powers of terminating them also, and minor powers in reference to both classes of entails; having in view the convenience of the heirs in possession, and the general principle that the estate should be made to bear its own burdens, rather than that these should press too heavily on the heirs personally.

¹ See on this point Lord Meadowbank's remarks in Hamilton, 3d March 1815, F. C.

² 11 & 12 Vict. c. 36.

Another change of great importance, introduced by the Act of 1848, IMPERFECT
ENTAILS. had reference to entails then existing, but which were imperfect, or at least not entitled to the protection of the Act of 1685, as not being framed or perfected in strict accordance with its provisions.

We have seen that entails with prohibitions were effectual at Common Law *inter hæredes*, and so as to prevent gratuitous contravention of the prohibitions. Equally so were entails with prohibitions and irritant without resolute clauses, or resolute without irritant clauses; or in which these clauses were not duly incorporated in the titles. When there was a mere prohibition, the heir could, for onerous causes, contravene in any way without incurring any loss or being subject to any claim. But if there were not only prohibitions, but also resolute clauses, contravention in respect to a portion of the estate involved forfeiture of the remainder. And, if there was a defect or loophole as to only one of the prohibitions, the heir could contravene that one prohibition only. Heirs in possession in such cases were in a very anomalous position; and it generally happened that their only practical remedy was to sell the estate. In such cases the substitute heirs were disappointed; for it was not incumbent on the heir who sold to re-invest the price: and it was often with great reluctance that heirs turned their family estate into money. To do away with this anomaly, the Entail Amendment Act, by sect. 43, provided that entails which were not valid and effectual in terms of the Act of 1685 'in regard to' each of the three great prohibitions against alienation, contraction of debt, and alteration of the order of succession, but were invalid and ineffectual 'in regard to' any one of these prohibitions, should be invalid and ineffectual 'as regarded' all the prohibitions of the entail. In virtue of this enactment it has now been repeatedly decided, that a deed of entail, registered as a strict entail under the Act of 1685, though containing all the necessary prohibitions, is not effectual against deeds done subsequently to the passing of the Act of 1848, if not containing also complete and unexceptionable irritant and resolute clauses.¹ With reference to the period prior to the passing of the Act of 1848, however, the case is different, because the Act had no retrospective effect. A deed by the heir in possession, granted before the Act came into operation, is construed with reference to the state of the law independently of the Act.

The case of an entail with simple prohibitions, as affected by this Act, has not been before the Court; but it may safely be held that such a deed would not be dealt with more favourably than one with prohibitory clauses, and also with defective irritant and resolute clauses superadded.

I apprehend, therefore, that of the three classes of deeds, described as formerly known in the category of the entail, there are now in effect

¹ Cunyngham, 9th March 1852, 14 D. 636; Dewar, 20th July 1852, 14 D. 1062; Ferguson, 18 Nov. 1852, 15 D. 19.

only two remaining, viz., (1.) The simple destination; and (2.) The strict entail. The destination with prohibitions only and the imperfect entail are on the same footing with the simple destination.

Deeds of the former class require no illustration. They are just the special disposition and settlement of lands, with a destination to a special class or series of heirs, in place of a destination to the institute or donee, and his heirs or assignees. They ought to contain procuratory of resignation and assignation to writs and rents, and, when granted *mortis causa*, reservation of the granter's liferent, and of power to revoke or alter, and clause dispensing with delivery. They may be granted under burdens or not, as the granter thinks fit.

The peculiarity of the strict entail consists in its containing either expressly, or (in virtue of special clauses in recent Acts of Parliament) constructively, prohibitory, irritant, and resolute clauses, in addition to the destination to a special class or series of heirs. And the manner of imposing the prohibitory, irritant, and resolute clauses in such deeds is different, according as the deed is dated before or after the Entail Amendment Act and the Titles Act of 1858 came into operation. There is also a difference in the case of deeds executed before and those executed since the Entail Amendment Act came into operation, as regards the power of disentailing and some other particulars. I shall point out these differences as we proceed.

HOW FAR OLD
AND NEW EN-
TAILS ARE
ALIKE.

Meantime I go on to notice those particulars in which entails under the old and new law, or old and new entails, are alike and on the same footing. In the first place, both old and new entails are deeds of conveyance of land; and there is no difference between the two classes, viewed as conveyances. There is no difference between them in this further respect, that either the old or the new entail can be contained in a disposition, bond, or procuratory of resignation, marriage-contract, or other contract, or generally in any deed which can be validly employed to convey lands, or to embrace a conveyance of lands.

If the entail, old or new, is in the form of a disposition,—as the new entail most usually is,—it will contain all the clauses usual in an ordinary disposition of lands, including, if granted *mortis causa*, reserved liferent to the granter, with power to him to revoke and alter, and dispensation with delivery.

If the entail is in the form of a procuratory of resignation, it commences usually (though not necessarily) with an obligation to resign, in which case it is called a bond of tailzie and procuratory of resignation. The obligation is, that the granter shall make resignation of the lands in the hands of his superior for new infeftment in favour of the institute and heirs of entail, subject to the conditions of the entail; and for accomplishing the resignation the procuratory is granted.

If the entail is incorporated with a marriage-contract, or other deed, there will be introduced in the deed either a disposition or a procuratory of resignation, with the appropriate relative clauses, in order that the

institute or heirs called to the succession may be enabled to feudalize the entail by infestment or by registration. But it is not indispensable, though it is very desirable, that the granter of an entail should himself have a real right, so as to be in a position to grant a similar right by infestment or registration. If he is so, the ordinary executive clauses will be inserted as matter of course; so that the institute or heir of entail on whom the succession first devolves may be able to obtain himself directly infest on the entail, or to register the entail as equivalent to infestment thereon. But, in a case where the granter was not infest, and had only a personal right by virtue of a disposition in his favour with procuratory of resignation and precept of sasine, and when the entail was in the form of a bond or obligation to resign and relative procuratory, with assignation to writs,—it was held that the entail was competently made; and that, in virtue of the disposition to the entailer, and of his obligation to resign and procuratory, with the assignation to writs contained in the deed of entail, a valid and effectual taillied investiture could be constituted in favour of the heirs of taillie.¹

In respect to the foregoing cases, old and new entails stand on the same footing. But, as before stated, entails are now usually granted in the form of a disposition.

Old and new entails are alike, further, in respect to the principles for DESTINATION. construction of the destination to the institute and heirs of entail. New entails, however, do not generally contain those long destinations which were not uncommon in old entails; because entails have not now that enduring character which formerly belonged to them. Now that three substitutes can put an end to an entail, there is no use in making long destinations. The destination is usually in favour of A., and the heirs of his body, or the heirs-male of his body; whom failing, to B., and the heirs of his body, or the heirs-male of his body; and so on, closing with a substitution in favour of the nearest and lawful heirs, or heirs and assignees whomsoever, of the entailer. This clause ought to contain at the end, and usually does contain, an exclusion of heirs-portioners in these terms :—‘The eldest daughter or heir-female always succeeding ‘without division, and excluding heirs-portioners throughout the whole ‘foresaid course of succession.’ The destination in an entail must be in favour of a special class of heirs. These, as far as the destination goes, may be the same as the heirs who would succeed by law, and without any destination; but there can be no entail simply in favour of the institute and his nearest and lawful heirs, or heirs whomsoever. Under such a destination the institute would hold in fee-simple.²

It is very convenient, and by no means unusual, in entails granted *mortis causâ*, for the entailer to name himself institute. We shall see the benefit of this in connexion both with the completion of titles under the entail and the mode of expressing the conditions of entail.

¹ Renton, 5th Dec. 1837, 16 Sh. 184; affirmed 18th Aug. 1843, 2 Bell's App. 214

² See Gordon, 2d March 1866, 2 Macph. 501.

CLAUSE OF
DEVOLUTION.

We have frequently a clause of devolution in entails, which may be introduced either in the destination or among the conditions. Such clauses are intended to prevent an estate, and the representation of a family, from being absorbed in some greater estate, or sunk in a peerage. The clause occurs in the entail of the smaller of two family estates, or in the entail of an estate brought by the wife of the proprietor of another estate. Where the provision was that, in case the heir should succeed to the dignity of a peerage, he should be bound to denude in favour of the next heir, an heir who succeeded to the estate after he had succeeded to a peerage was held to be excluded from the estate.¹ But where the provision was that the heir should forfeit the estate of A., in case of his succeeding to the estate of B., it was held lawful to the heir, notwithstanding that the succession to the estate of B. opened to him, to make his election between the two estates. He could not hold both; but he was entitled, in spite of the letter of the clause in the entail, to prefer the estate of A. to that of B., and to retain the estate of A. on renouncing B., in like manner as if the stipulated forfeiture had reference to the latter.² The clause of devolution, as usually framed, gives the second estate to the second son, either on his birth or when he attains twenty-one years of age; and it not unfrequently happens that, in virtue of such a clause, the second son takes his estate from his father long before his father's death, and is likewise in full possession of an estate whilst his elder brother, though heir-apparent of the larger estate, is unprovided. I think it is a more natural and wholesome arrangement, to secure to the father the enjoyment of both estates during his lifetime, and to make the devolution in favour of the second son take effect in no case before his father's death. In that way the second son will obtain no preference or priority over the eldest. Each will wait for his succession until the death of their father; and they will then enter respectively to their several estates.

The clause for the above purpose may run thus:—‘But with this provision and declaration always, that, as it is my wish and intention that my lands and estate after disposed shall not be permanently held and enjoyed along with the lands and estate of B.; therefore, in case any of the heirs succeeding to my said lands and estate in virtue hereof shall have previously succeeded or shall subsequently succeed to the said lands and estate of B.; and in case such heir shall, at the time of his or her death, leave (in addition to an eldest son, or other descendant succeeding to the said lands and estate of B.) a second, or other younger son, or any descendant of the body of a second, or other younger son previously deceased, then, and in that case, my said lands and estate shall, upon the death of such heir, descend to and devolve upon his or her second and other younger sons successively in their order, and the heirs whatsoever of their bodies respectively, excluding

¹ Lord Elphinstone, 19th Jan. 1804,
M. 15,559.

² Stirling, 16th January 1834, 12 Sh.
296.

'the eldest son or heir entitled upon such death to succeed to the said lands and estate of B.; without prejudice, nevertheless, to such eldest son, or the heirs of his body in their order, having right to succeed to my said lands and estate after the failure of such second and other younger sons, and the heirs of their bodies, in case such failure shall happen, but always subject to the provision and declaration before written.'

Sometimes we meet with a destination to one or more parties successively in liferent, following after a destination to others in fee. It is quite competent to introduce liferent rights in this way; but it seems difficult to say how the liferenters are to complete their titles, in case of the succession devolving on them; and, as in a case of entail it may sometimes be practically the same thing to give a particular individual either the liferent, or to give him the fee, the difficulty here suggested would be got over by giving the parties a right of fee, excluding their descendants if they are not to be called. No doubt ways and means of giving a title to a liferenter succeeding as above will be devised if necessary; but it is not desirable to be the means of illustrating nice points of practice.

It was usual to insert the destination at full length in all the titles following on the entail; but reference to it as contained in the entail, if recorded in the register of entails, or as contained in any conveyance, instrument of sasine, or other writ, duly recorded in the appropriate register of sasines, and forming part of the progress of title-deeds of the lands contained in the entail, is now equivalent to the full insertion.¹

As regards the subjects which can competently be entailed, the Act of 1685 speaks generally of 'lands and estates,' and 'of the lordships and baronies.' The power of entailing certainly includes every feudal and burgage right of property.² Heritable debts cannot be entailed; and it was questioned, but not decided, whether the entail of lands held in virtue of an adjudication which had been feudalized, but as to which the legal reversion had not expired, was effectual.³ An entail may comprehend a lease.⁴ But as to the lease it will be good *inter hæredes* only.⁵ Moveable effects may also be entailed, as *inter hæredes*. It was so found with respect to a jewel which the King of Sweden had given to General Leslie, afterwards Earl of Leven, and which he had bequeathed to his family, with a prohibition against alienating.⁶ The conveyance of moveable effects, however, ought to be introduced in the entail separately from that of the lands; and the conditions of entail ought not to involve the forfeiture of the lands on account of the sale of the moveables.

¹ Titles Acts, 1858, s. 17, and relative schedule (L), No. 3; and 1860, s. 11, and relative schedule (H), No. 2.

² M^r Lauchlan, 27th January 1768, M. 15,421; Dillon, 14th January 1780, M. 15,432.

³ Dalzell, 17th Jan. 1810, F. C.

⁴ Dalhousie, 1st March 1782, M. 10,963; Maule, 4th March 1829, 7 Sh. 527.

⁵ Sandford on Entails, 253.

⁶ Earl of Leven, 27th Feb. 1683, M. 3217. See also Veitch, 25th May 1808, F. C.; and Baillie, 21st May 1859, 21 D. 838.

SUCCESSIVE
LIFERENTS.

WHAT SUB-
JECTS CAN BE
ENTAILED.

We next notice the insertion in the entail of the description of the lands entailed.

DESCRIPTION
OF LANDS.

If entails were to be viewed as mere conveyances of lands, a general description might be sufficient, just as in the case of the ordinary disposition and settlement or trust-deed. For example, if the entailor's right consisted of a disposition in his favour, with unexecuted procuratory of resignation and precept of sasine, a general description of all lands belonging to him, accompanied by assignation to the writs, would be sufficient for enabling the institute and heirs of entail to complete their titles. They would obtain themselves infeft on the disposition to the entailor and procuratory or precept in that deed, to which they would have right in virtue of the entail and general disposition of lands and assignation of writs contained in it; or in virtue of the same warrants they might expedite and record a notarial instrument. But entails are intended to be more than conveyances; they are intended, by means of the records, to publish to third parties that certain particular lands have been subjected to their fetters; and it is necessary for that purpose that the register of entails shall exhibit what lands are affected by the entail, as well as the conditions imposed on the lands,—for which reason the lands must be described in the entail. It was so decided in a case where lands called 'Cults' were held to be open to the diligence of the creditors of an heir of entail who had been in possession, because, though falling under the general conveyance in an entail, and therefore belonging to the heirs of entail, they were a separate feudal tenement, and had not been possessed as part and pertinent of the lands specially described in the entail.¹ The records, therefore, did not show that they were subject to the fetters. It is not to be understood, however, that the entail and records must actually specify the particular name of every individual farm or possession falling within the description contained in the entail. The entail of a barony would embrace every component part and pertinent of the barony, whether named in the description or not. The peculiarity in the case of Cults was, that it had been a separate feudal tenement, and had not been incorporated with any barony or other subject contained in the entail. It therefore remained a separate feudal tenement, to which the general rules of law applied. In order to bring the lands under the entail in such a case as that of Cults, the heir of entail (if heir *alioqui successurus*) ought to make up a title in that character in fee-simple, and grant a valid entail in supplement of the entail with general conveyance. If not *alioqui successurus*, he ought to obtain decree of constitution and adjudication in implement against the heir under the fee-simple investiture, and thereafter grant a valid entail in supplement of the entail with general conveyance. In either case the valid entail requires to be recorded and feudalized.

I have explained that the deed of entail itself must actually show what lands are affected by its provisions; but an entail made by one of

¹ King, 28th Feb. 1844, 6 D. 821; affirmed 30th April 1846, 5 Bell's App. 82.

several heirs-portioners of her share *pro indiviso* of her predecessor's estate sufficiently points out and affects her share of the estate, when afterwards legally divided by judicial process.¹ It was contended in Stewart's case that a *pro indiviso* right could not, in its own nature, be made the subject of entail; and that, even if it could, the estate which was held under the entail after the legal division was not the same estate which was contained in the deed of entail, the latter having been the one undivided third part of the whole barony of A., and the former being certain particular portions of that barony;—that, to bring these portions under the fetters, there ought to have been a supplementary deed of entail thereof in due form, followed by registration and feudalization. But the Court decided not only that the *pro indiviso* right could in its own nature be entailed, as is done without objection in the case of lochs, commons, etc., but that the entail of the *pro indiviso* share of certain specified lands sufficiently pointed out and affected the equivalent to that share obtained by legal process. The principle of the judgment on this last point will be shown in the following passages from the opinion of the Lord President, who says,—‘That is a question of some subtlety.’ ‘I think that, when the lands come to be divided, there is not a new estate created. I think it is the same estate, though on a different mode of possession, and a more convenient mode of possession; it is separated from the other portions and concentrated, but still it is the same estate which the party had. In that view of the matter, I think that the act of division did not of itself destroy the entail.’ ‘I think it depends upon what construction you put upon, and what effect you give to, the decree dividing the lands,—whether it is an alteration of the estate, or whether it is merely a different shaping of the estates which had previously subsisted in the parties. I think it is the latter.’

In that case the division took place by legal process, the effect of which is, by itself, and without any supplementary conveyance or other feudal title, to make the title of each heir-portioner, in the *pro indiviso* share of the whole lands, a valid and complete title to her divided share—to the particular portions assigned to her in the division;—a circumstance strongly founded on in support of the entail. Whether the same result would arise, supposing the division to take place extrajudicially, is a question which was not touched upon; nor is such question likely to occur in reference to entailed lands; as heirs of entail are apparently not entitled to adopt means for the extrajudicial division of undivided lands among heirs-portioners, or others having right thereto.

We now come to the conditions usually introduced in entails, some CONDITIONS. of which, though of practical importance, are not essential; and it may be well, whilst merely noticing these clauses in the places where they occur in the deed, to consider, in the first place, what conditions and what other particulars are essential in order to the constitution of a valid entail and taillied investiture. The other conditions, or most of

¹ Stewart, 2d Dec. 1859, 22 D. 72.

them, have their value as subsidiary clauses, intended to secure the observance of what is essential; and the subsidiary clauses will be best understood after we have examined the essentials. The particulars which must concur, in order to constitute a valid and effectual entail of lands, are—

1. The deed of entail itself (if of feudal subjects, and granted before the Titles to Land Act of 1858 came into operation, and if of burgage subjects, and granted before the Act of 1860 came into operation) must contain substantive prohibitions directed against the three following acts, viz., altering the order of succession constituted by the deed; alienating the lands; and contracting debt so as to create a burden on the lands.

**DISTINCTION
BETWEEN OLD
AND NEW
ENTAILS.**

2. If dated before 1st August 1848, the deed must contain irritant and resolute clauses; the former (the irritant) declaring void all acts and deeds in contravention of the prohibitions; and the latter (the resolute) declaring to be resolved or forfeited the right of every person who shall contravene the prohibitions. If dated after 1st August 1848, irritant and resolute clauses are unnecessary, when the entail contains an express clause authorizing registration in the Register of Entails.¹ And if the entails are of feudal subjects, and dated after the Titles Act of 1858, or of burgage subjects, and dated after the Act of 1860 came into operation, the three great prohibitions against alienation, contracting debt, and altering the order of succession, are unnecessary when the entails contain such express clause of registration. Such express clause of registration is declared, by the Entail Amendment Act, sect. 39, to have the same operation and effect as the most formal irritant and resolute clauses, in deeds of entail executed on or after 1st August 1848; and it is declared, by the Acts 1858, sect. 18, and 1860, sect. 12, to have the same operation and effect in subsequent entails of feudal or of burgage property respectively, as the above mentioned clauses of prohibition, duly fenced with irritant and resolute clauses, would have in such entails.

3. The deed of entail itself, whether dated before or after 1st August 1848, must be recorded in the Register of Entails.

4. The clauses, prohibitory, irritant, and resolute, in the case of the old entail, must all be accurately engrossed in the instrument of sasine, or notarial instrument, if any, by which the deed of entail is feudalized. And if the sasine, or notarial instrument, follows upon a charter of resignation, of which the entail is the warrant, or on a charter of adjudication in implement, these clauses must be accurately engrossed in the charter, as well as in the sasine or notarial instrument. The registration of a deed of entail, however, in the Register of Sasines, with warrant of registration thereon, is equivalent to expeding and recording an instrument of sasine, or notarial instrument, following on the entail.

In the case of the new entail (that is, an entail dated on or after 1st

¹ Entail Amendment Act, s. 39.

August 1848), if of feudal subjects, and dated before the Titles Act of 1858, and if of burgage subjects, and dated before the Act of 1860 came into operation, the prohibitory clauses, with the clause of registration, must be engrossed in the instrument of sasine, or charter and sasine, or notarial instrument, if any, in like manner; but if the entail is of feudal subjects, and dated after the Titles Act of 1858, and if of burgage subjects, and dated after the Act of 1860 came into operation, the prohibitory clauses are unnecessary. As to entails of feudal and burgage subjects respectively so dated, the clause of registration is equivalent to the prohibitions as well as to the irritant and resolute clauses.

5. In the case of old entails, the clauses prohibitory, irritant, and resolute must in like manner be engrossed in all the subsequent titles expedite prior to the operation of the Conveyancing Acts of 1847 (30th September 1847); and, in the same way, they must be either engrossed or validly referred to in such titles expedite after that date, as provided by the Conveyancing Acts. And in the case of new entails of feudal subjects dated before the Titles Act of 1858, and of burgage subjects dated before the Act of 1860 came into operation, the prohibitory and registration clauses must either be accurately engrossed, or validly referred to, in the subsequent titles, as provided by the Entail Amendment Act. There is now also a corresponding provision in the Titles Act of 1860, sect. 27, as to the registration clause authorized by the Acts of 1858 and 1860, as instead of the prohibitory, irritant, and resolute clauses.

When all the requisite particulars above specified respectively concur, there is, as a general rule, a valid entail and entailed investiture under the old or new system, as the case may be; and the estate will be protected against the debts and deeds, onerous and gratuitous, of the institute and heirs of entail.¹

The leading distinction between the old and new entails in point of form, you will observe, consists in this—that, whereas the old entail must contain express prohibitory, irritant, and resolute clauses, the new entail does not require irritant and resolute clauses, if dated before the Titles Acts came into operation, nor express prohibitory clauses if dated since, provided it bears an express clause authorizing registration in the Register of Entails. But as such clause of registration has, by Statute, the effect of the irritant and resolute clauses, or of the prohibitory, irritant, and resolute clauses (as the case may be), as formerly explained, there is no difference between the essential requisites of the new and the old entail as regards the principles of their structure. The requisites of each class may in fact be stated thus,—(1.) conditions properly constructed; (2.) registration in the Register of Entails; and (3.) feudalization.

I proceed to examine the clauses of the entail as they are usually

¹ Ross, 3d March 1841, 3 D. 698; affirmed 4th Sept. 1844, 3 Bell's App. 87.

'for introducing some limitations, consistent at once with the rules of 'justice, and with public policy.' In accordance with these views, the clauses imposing or giving efficacy to the fetters, in old entails, received the most rigid construction. We have seen that, in construing ordinary testamentary deeds, the Court will endeavour to the utmost to discover, and will give effect to, the intention of the party, as gathered from his deed or deeds of settlement. But in regard to the fetters in entails the very opposite principle has always prevailed. The most plain and obvious intention of the party will be allowed no weight, if the words employed by him are not sufficient to give effect to it. In virtue of the entail as a deed of conveyance, the institute or heir in possession is proprietor of the lands; and, as such, he can deal with them at his pleasure, in so far as he is not validly and effectually restrained; and accordingly, in spite of the most manifest intention to restrain him, he will be unfettered, if terms legally sufficient to restrain him are not employed.

The extent to which the restraints imposed by the old law were allowed to go has been so greatly modified, that entails are not now regarded with the same degree of odium as formerly. They are not now capable of being made permanently causes of inconvenience, as was formerly the case; but still they are deeds imposing restraints whilst they last; and, as regards the import of the fetters, the same principles of construction are applied to the new as to the old deed.

These being the principles of construction, we now proceed to the consideration of the clauses.

**PROHIBITORY
CLAUSES.**

The prohibitions come first in order; and special care is required to direct these against all the members of the destination intended to be brought within their operation. Any member not embraced in the prohibitions, according to the rule of strict interpretation above explained, will be free.

I have mentioned that there is convenience in making the entailer dispoise or grant procuratory of resignation in favour of himself in the first place, and thereafter to the heirs of his body, whom failing, the other heirs; or simply to himself, whom failing, to the heirs of entail. The benefit of this form, as far as the proper entail clauses are concerned, is that in such case the entailer himself is the institute, and the prohibitions and other clauses, if directed simply against 'the heirs of entail,' or the acts or omissions of the heirs, will embrace all the members of the destination whom it is intended to restrain,—viz., all called by the entailer after himself. Supposing, however, that the entailer dispoises or grants procuratory in favour of A. B. and the heirs of his body, whom failing, etc.; then, if the deed is delivered to A. B., or if A. B. survives and takes under the deed by the entailer's death, he (that is, A. B.) is the institute; and were the prohibitions, or any of them, directed simply against 'the heirs of entail,' the institute would not be embraced in them, but would be free. It was so settled by the House of Lords in

the Duntreath case.¹ The entail in that case was so expressed as to leave no doubt of the purpose of the entailer to fetter the institute under the general term 'heirs of entail.' But the House of Lords held that 'the appellant, being fiar, or disponent' (that is, institute), 'and not an heir of tailzie, ought not, by implication from other parts of the deed of entail, to be construed within the prohibitory, irritant, and resolute clauses laid only on the heirs of tailzie.' This rule has since been rigidly and uniformly enforced, notwithstanding the clearest purpose of the entailer that the term 'heir of entail' should include the institute as well as the proper heirs. The application of the rule, however, has occasioned some difficulty; the result depending on the questions, whether the party claiming to be free was or was not institute or disponent, or whether, he being so, the words employed were sufficient to embrace him in that character. In reference to the former question, the Court have uniformly held that party to be the disponent or institute to whom the estate is first destined in fee, whether he be heir of line of the entailer or a stranger, and whether the tailzie be constructed in the form of a disposition or in that of a procuratory of resignation;² and this has been carried so far as to admit to the position of institute or disponent the party entitled to the fee under a destination to his mother in liferent 'only,' and to him (her second son) and the heirs of his body in fee, though he was not in existence at the date of the entail, nor for two years after the entailer's death.³ In this case, it was held that the party called as above to the fee was the institute, and not bound by the prohibitions directed against his mother by name and 'the heirs of entail.' The Lord Ordinary, Corehouse, said, 'The fee vested in the second son, *ipso jure*, as soon as he came into existence, as institute. No fee could be transmitted to him from his mother. If he served heir to her, it was for the purpose not of acquiring, but of declaring, a right to the estate.' In the House of Lords, the second son was held entitled to the character of institute in the question at issue, as being the first beneficiary taker of the fee.

A proper conditional institute is entitled to all the privileges of the institute, on the condition attaching to his right being purified; and prohibitions directed against heirs only would not reach a proper conditional institute.⁴ But, in construing the clauses, we are to look to the effect and construction of the terms used at the time the deed was made; and when a person was called as a substitute, but became institute in consequence of the institute named in the deed having predeceased the entailer, prohibitions directed against the original institute and 'the

¹ Edmonstone, 15th April 1771, 2 Paton's App. 255, reversing the judgment of the Court of Session, 24th Nov. 1769, M. 4409.

² Duff, p. 355.

³ Maxwell, 20th Dec. 1836, 15 Sh. 291;

affirmed 1st Aug. 1839, M'Lean & Robinson, 790.

⁴ Bell's Principles, 1746; Menzies, 25th June 1785, M. 15,436 (confirmed on remit from the House of Lords, 18th Jan. 1803); affirmed 20th July 1811, 5 Paton's App. 522.

heirs substitutes and successors before mentioned' were held to embrace the person who had become institute; these terms having correctly described that party according to the position which he held in the deed as it was framed.¹ The same principle received effect in a case where the heir who succeeded made up his title by adjudication, in implement of a clause of devolution in the entail.² He was truly an heir, though the form of his title was that of a judicial disponee.

When the destination is to the heirs of the granter's body, whom failing to B., it has been held that B. is not entitled *de plano* to be infeft on the disposition, although the granter shall have died without heirs of his body; and that service of B. as heir of provision to the granter under the deed is a competent proceeding for instructing his right.³ The necessity for service, in order to its performing the appropriate function of the transmission of a feudal right, is the test by which to say whether a party is the institute or an heir-substitute. But the service in such a case as Peacock's is for a different object. It is to prove a fact, not to transmit a right; and the party in such case appears to be originally conditional institute, and, in case of the failure of heirs of the body of the granter, institute and not heir.

With respect to the terms admitted as sufficient for describing or embracing the institute, we have a variety of cases. The mere term 'heirs of tailzie' has never been held enough. The term 'heirs and members of tailzie' was held not to comprehend the institute, who in one clause was put in opposition to heirs and members.⁴ But the term 'person or persons, heirs of tailzie foresaid,' having plainly reference to the institute and substitutes, as correctly described in prior clauses of the deed, was construed to embrace both.⁵ A similar interpretation was given to the term 'heir or person so contravening,' occurring in the resolute clause, with reference to prior clauses in which the institute was expressly named.⁶ The like interpretation was given to the term 'person or persons,' in similar circumstances.⁷ And it would seem that where an estate has been destined by a father to himself in liferent, and his sons in their order, and the heirs of their bodies in fee, prohibitions directed against the 'heirs-male or female of the granter's body, and the other heirs of tailzie,' would include the eldest son as institute; but such interpretation has not been given to the general expression 'heirs descending of the body,' even though occurring in an entail by a father to himself in liferent and his son in fee.⁸

¹ Mackenzie, 24th Nov. 1818, F. C.; affirmed 13th May 1822, 1 Sh. App. 150.

² Henderson, 12th November 1796, M. 15,442.

³ Glen, 15th Feb. 1821, Sandford on Entails, 242; apparently the same case with Peacock v. Glen, 22d June 1826, 4 Sh. 742.

⁴ Steele, 12th May 1814, F. C.; affirmed 24th June 1817, 5 Dow's App. 72.

⁵ Syme, 27th Feb. 1799, M. 15,473.

⁶ Douglas, 14th Nov. 1823, 2 Sh. 487; affirmed 10th June 1825, 1 Wil. & Sh. App. 323.

⁷ Buchanan, 25th Jan. 1838, 16 Sh. 358.

⁸ Baugh, 14th Jan. 1834, 12 Sh. 279; Opinions of consulted Judges in Brown, 11th March 1837, 15 Sh. 837; affirmed 12th Feb. 1838, 3 Sh. & M'L. App. 84.

It is equally necessary to be careful to include all the heirs in the restraining clauses ; for each heir, being *fiar* after his succession, is entitled, just as the institute, to do whatever he is not competently restrained from doing. Thus, where the entailer destined his estate to two grandsons successively, and the heirs-male and female of their bodies ; whom failing to his grand-daughter, and the heirs-male of her body ; whom failing to the heirs-female of her body, etc. ; and the prohibition to alienate was directed against the heirs-female of the bodies of the grandsons, or 'any others of the heirs-female above specified ;' the heirs-male succeeding under the destination to the grand-daughter, and the heirs-male of her body, were held not to be comprehended in the prohibition ; although, on strict technical principles, all the descendants of the grand-daughter were heirs-female of the entailer.¹

These cases, I think, exhibit the importance of making the entailer himself the institute, if the deed is *mortis causâ*. In that way the whole of the persons called to succeed after the entailer are heirs of entail ; and restraining clauses directed against the heirs of entail generally will be completely effectual. If the deed is *inter vivos*, the institute may or may not be the maker of it. If he is the maker, the clauses should be directed against 'myself and the whole heirs' (not 'other heirs') 'of entail foresaid.' If the institute is not the maker, the best mode of comprehending him is to name him. The clause in that case will be directed against 'the said A. B., and the whole heirs of entail foresaid.' In any case, care must be taken to comprehend the institute and all the heirs in each and every one of the restraining clauses. Omission in any one would be fatal, though every other should be critically accurate. It is equally necessary to employ words embracing or applicable to the whole lands contained in the entail, or intended to be thereby affected.

I may here remind you, however, that although the rule of strict interpretation is rigorously applied against entails, and so that in the fettering clauses the term 'heirs of entail' does not embrace the institute, the same rule is not applied in construing Lord Aberdeen's Act, passed for unfettering heirs *pro tanto*, and empowering heirs of entail to grant provisions to their wives or husbands and younger children. The term 'heirs of entail,' as there made use of, has been found to include the institute.²

The objects of the prohibitions are next to be considered.

As already observed, there must be in entails, granted before the Titles Acts came into operation, substantive prohibitions directed against the three acts of altering the order of succession, alienating the estate, and burdening the estate with debt ; or prohibitions sufficient to comprehend all these acts. If the clauses are to be expressed, it is

OBJECTS OF
PROHIBITIONS.

¹ Dalryell, 30th May 1809, F. C.

² Hamilton, 11th March 1857. 19 D. 723.

PROHIBITION
TO ALTER
SUCCESSION.

advisable to make three separate prohibitions, as is done in the form given in the Juridical Styles.¹

The prohibition to alter the succession usually comes first, and runs thus:—‘It shall not be lawful to the said heirs of entail’ (or ‘the said ‘A. B., and the heirs of entail foresaid’) ‘to innovate, alter, or infringe ‘this tailzie, or the order of succession hereby established.’ It is remarkable that this prohibition, though held to be authorized by the Act of 1685, is not substantively embraced in the words of the Act; and some old entails have been found inoperative because, holding the Act to form a safe style for accomplishing all its purposes, they have simply adopted its words. But, whilst there are no *voce signata* in reference to this, or indeed as to the other clauses, it is indispensable in entails executed before the Titles Acts came into operation that there be a substantive prohibition against alteration of the succession. Thus, where valid substantive prohibitions against selling or contracting debt were followed by a prohibition to ‘do any other deed whereby the said lands ‘may be adjudged or evicted from the succeeding members of tailzie, or ‘their hopes of succession thereto in any manner evaded,’ there was held to be no substantive prohibition against altering the order of succession.² A decision to the same effect was pronounced in the case of the Coalston entail;³ and these decisions correct that in the Lochbuy case,⁴ where the words which were held as embracing the prohibition to alter the succession were almost identical with those in Lang’s case. But, on the other hand, it has been held that there is a substantive prohibition against alteration, where the entail contains prohibitions against selling or contracting debt, immediately followed by a prohibition against doing anything ‘in hurt and prejudice of these presents, and of the foresaid ‘tailzie and succession;’⁵ or a prohibition against doing ‘any other fact ‘or deed in prejudice of the said tailzie, and of the persons above ‘named, and their foresaids.’⁶

The prohibition to alter the succession prevents an heir from adding to the destination, as well as from inverting it.⁷ But the heir in possession under an entail which does not validly prohibit alteration can, as fiar of the estate, avail himself of his power and make a new entail; and, if that is valid in all respects, the heirs called under it are not entitled to repudiate it and go back to the original entail, so as to acquire the power of alteration competent under it. The old entail is at an

¹ Juridical Styles, vol. i. p. 226, 4th edit.

² Lang, 23d November 1838, 1 D. 98; reversed 16th June 1839, M’Lean & Robinson’s App. 871.

³ Brown, 25th May 1808, M. App. voce Tailzie, No. 19.

⁴ MacLaine, 23d June 1807, M. App. voce Tailzie, No. 14, and F. C.

⁵ Innes (Roxburghe Entail), 23d June

1807, M. App. voce Tailzie, No. 13; affirmed, 5 Paton’s App. 362.

⁶ Rowe, 9th Feb. 1837, 15 Sh. 500; Campbell, 22d Dec. 1837, 10 Jurist, 175, Note by Lord Cuninghame; affirmed 16th August 1839, M’Lean & Robinson’s App. 898.

⁷ Menzies, 25th June 1785, M. 15,436; Meldrum, 29th June 1827, 5 Sh. 857; Earl of Fife, 7th March 1828, 6 Sh. 698; Bell’s Principles, 1759.

end, and extinguished as a ruling settlement by the new entail.¹ The real question in Oliphant's case was, whether the new deed, which was executed in 1816, was an alienation, in which case it was beyond the grantor's power; or a mere alteration of the order of succession, in which case it was within his power. No such question would now arise upon any deed executed since the Rutherford Act came into operation; because, by that Act (sect. 43), if there is no prohibition to alter, alienation is open to the heirs equally with alteration. But in the case of Oswald's Trustees,² prohibition against alteration was found effectual to support an old entail in which the prohibition to alienate was defective, against a gratuitous *mortis causa* conveyance granted by the heir in possession before the passing of the Act of 1848. The conveyance, though in the form of a disposition, was truly and essentially an alteration of the order of succession.

We next take the prohibition against alienation, which runs thus:— PROHIBITION
AGAINST
ALIENATION.
'It shall not be lawful to the said heirs of entail' (or 'the said A. B. and the said heirs of entail') 'to sell, alienate, or dispo[n]e the foresaid lands and estate, or any part or portion thereof, either irredeemably or under reversion.' The Style Book says simply 'sell and dispo[n]e.' If the clause is to be expressed, I think it advisable to employ the word 'alienate,' as well as 'sell or dispo[n]e,' especially as the Titles Act of 1858 speaks of the clause as the 'prohibition against alienation.' But I believe that 'sell and dispo[n]e,' or even 'dispo[n]e' by itself, would be enough. Here, as in the other cases, the prohibition must be substantive, and not by inference merely. Thus, a prohibition against altering, innovating, or changing the tailzie, or the order of succession therein appointed, or the nature or quality thereof, 'in any manner of way,' is not effectual to prevent selling or burdening;³ nor is a prohibition effectual which is directed against doing 'any facts or deeds in prejudice of the other heirs their right of succession.'⁴

But, whilst a prohibition against selling will not prevent disposing or alienating otherwise than by sale,⁵ a prohibition against 'annailzieing and 'dispo[n]ing,' or simply against 'dispo[n]ing,' will include disposal by sale.⁶ And where the prohibition was against 'squandering or putting away' the estate, or any part thereof, '*vel faciendo vel delinquendo* any ways contrary to this present settlement,' there was held to be a good prohibition against disposing. In fact the term 'putting away' is exactly equivalent to 'dispo[n]ing.'⁷

The prohibition against alienation, if unqualified, will be sufficient to protect against absolute dispositions; but, where the clause was directed

¹ Oliphant, 19th June 1851, 13 D. 1174.

² Oswald's Trustees, 11th Dec. 1863, 2 Macph. 249.

³ Campbell, 17th June 1746, M. 15,505; Sinclair, 8th Nov. 1749, M. 15,382.

⁴ Nisbet, Nov. 1763, M. 15,516; affirmed 20th March, 1765, 2 Paton's App. 98.

⁵ Russell, 7th December 1852, 15 D. 192.

⁶ Hepburn's Creditors, 8th Feb. 1758, M. 15,507; affirmed 6th Dec. 1778, 2 Paton's App. 17; Elliott, 19th May 1803, M. 15,542.

⁷ Cuming, 29th July 1761, M. 15,513.

against disposing 'either redeemably or under reversion,' it was held that, however clear the intention, there was no valid prohibition against absolute and irredeemable sales.¹ And the same result arose when, in the corresponding clause of another entail, the first two syllables of the word 'irredeemably' were written on erasure: the erased portion was held *pro non scripto*, and the clause no longer ran as an absolute prohibition against disposing.²

The prohibition against alienation is also effectual to prevent the granting of feu-rights, even for an adequate feu-duty, as these are both sales and alienations.³ And this prohibition, though qualified by a power to grant feus, is effectual to prevent that power from being used fictitiously as the means of altering the order of succession.⁴

The prohibition to dispoise, alienate, and put away, is sufficient likewise to prevent the granting of leases to endure beyond twenty-one years, although the granting of such leases is not expressly prohibited by the entail.⁵ Such prohibition is also effectual to prevent the granting of leases, even for twenty-one years, in consideration of a fine or grassum over and above the yearly rent,—a grassum being regarded as anticipated rent, or as the price of a portion of the future rent.⁶ But when the entail contained a prohibition against granting leases,—with an exception authorizing them for any term of endurance the heirs of entail might think fit, provided the rent should not be less than a specified amount per acre,—a lease for 999 years at the specified rent was sustained, although over and above that rent the tenant paid a large grassum.⁷ The mansion-house and its proper pertinents cannot be let beyond the lifetime of the granter of the lease.⁸ The case of Cathcart likewise settled some points relative to the selling of timber on the estate. But wood ripe for cutting, if not necessary for the amenity of the mansion-house, may be cut and sold.⁹ The price of such wood belongs absolutely to the heir who sells and receives it.

It is not an alienation, or prohibited disposition, to propel the fee of the estate to the next heir,—being the heir who, if he survives, must necessarily succeed.¹⁰

PROHIBITION
AGAINST
CONTRACTING
DEBT.

We come next to the third prohibition, viz., that against contracting debt; as to the constitution of which the same general rules apply as to the other prohibitions. If expressed, it may run thus:—'It shall not be

¹ Earl of Eglinton, 14th Feb. 1845, 7 D. 425.

² Boswell, 28th Jan. 1852, 14 D. 378.

³ Cathcart, 31st Jan. 1755, M. 15,399, 15,403, and 5 Br. Sup. 818; affirmed 19th March 1756, 1 Paton's App. 618.

⁴ Duke of Roxburghe, 17th June 1813, F. C.; affirmed 18th Dec. 1813, 2 Dow's App. 149.

⁵ Queensberry Leases, 30th March 1819, 1 Bligh's App. 339; Elliott, as reversed,

14th Mar. 1821, 1 Sh. App. 16, 89; Innes, 9th March 1819, F. C.; affirmed 5th July 1822, 1 Sh. App. 169.

⁶ Queensberry Leases, and Elliott, *ut supra*.

⁷ Earl of Elgin, 13th June 1821, 1 Sh. App. 44.

⁸ Cathcart's case.

⁹ Hamilton, 16th February 1757, M. 15,408.

¹⁰ Craigie, 4th Dec. 1817, F. C.

'lawful to the said heirs of entail' (or 'to the said A. B., and the heirs of entail foresaid,' as the case may be) 'to contract debt, nor to grant bonds, heritable or moveable, or other deeds or writings, nor to do any other act, civil or criminal, which shall be the ground of any adjudication, eviction, or forfeiture of the said lands and estate, or anyways affect or burden the same, or the rents thereof, in prejudice of the succeeding heirs of entail.'

As the object of the entail is merely to protect the substitute heirs, and the estate for them, this clause does not strike at the mere contraction of personal debts, on which no diligence follows against the estate. This point was tried and settled in the case of *Denham*,¹ which Lord Kilkerran speaks of 'as an instance that lawyers will argue anything.' Whilst, therefore, on the one hand, the prohibition to contract debt will be enough for the protection of the estate, it is, on the other hand, sufficient to prohibit the contraction of debt on the lands;² it is also sufficient to prevent burdening the lands, in whole or in part, with debts or sums of money.³ The prohibition, against contracting debt when duly constructed, strikes at debts of all kinds capable of affecting the estate, including provisions to wives, husbands, and younger children.⁴ It likewise strikes at obligations to tenants for meliorations on their farms,⁵ except, of course, so far as burdens of these classes are imposed under powers conferred by the entail or by Statute.

But the prohibition has in view the interests of the future heirs, not the exclusion of the *fiar* in possession for the time from the full use of the estate during his lifetime; and, accordingly, each *fiar* can deal with the rents of the estate falling due to himself, and make them available in security of debt, or by way of trust-conveyance for creditors at his pleasure, without being held to have contravened. It is necessary, however, for the heir in possession, when so dealing with his rents, in order to exclude the plea that he is thereby contravening the entail, to introduce in the deeds of security or trust-deeds an express clause to the effect that nothing more is conveyed than the right and interest which, in consistency with the entail and titles, the *fiar* is entitled to convey in security or in trust without contravention. A form of this clause, as inserted in a bond and disposition in security, will be found in the *Style Book*.⁶ Securities of the description now spoken of are usually effected by means of an assurance in name of the creditor on the life of the borrower, which, becoming available when his interest in the estate ceases, pays the principal sum; coupled with an assignation to the creditor of the rents of the entailed estate, out of which the interest of the loan and premiums of assurance during the borrower's life are paid

¹ *Denham*, 15th Dec. 1737, 5 Br. Sup. 200.

² *M'Kenzie*, 23d May 1823, 2 Sh. 331; and *Burden*, 26th Nov. 1845, 8 D. 90; affirmed 25th March 1850, 7 Bell's App. 32.

³ *Nisbet*, 10th June 1823, 2 Sh. 381.

⁴ *Borthwick*, Feb. 1730, M. 15,556.

⁵ *Hunter's Landlord and Tenant*, ii. 220.

⁶ *Juridical Styles*, vol. i. p. 647.

as they fall due. But in most cases land estates, though entailed, afford securities to a certain extent without assurance; the rents being conventionally payable sometimes six or nine or even twelve months after they are legally due. In this way there will become payable after the heir's death half a year's or sometimes a whole year's rents; and to the extent of whatever sum will certainly be due after his death, the fiar can give an unexceptionable security without the aid of life assurance. The deed of security, however, must contain the usual clause for preventing the plea of contravention, in the same way as when an assurance forms part of the security.

PROHIBITION
AGAINST ADJUDICATIONS.

We frequently meet with a prohibition against permitting adjudications to pass against the lands. That clause is not necessary to protect the lands against diligence founded on the ordinary debts of the institute or heirs of entail, if the prohibition against contracting debt generally is properly constructed; nor will it be effectual at all if the general prohibition against debt is defective. The object of the clause is to prevent adjudication on debt of the entailor, or on other debts legally affecting the estate. Against these the ordinary prohibitions of the entail are inoperative. But by this clause the heir in possession is taken bound to prevent adjudications from being led thereon. By such diligences the estate might be greatly dilapidated; whilst, by taking advantage of other means allowed by law for providing for the debts which really affect it, all arrangements necessary for the security of creditors may be made without detriment to the estate. The right of the fiar in possession may, however, be adjudged notwithstanding this clause, which, like the prohibition to contract debt, has the interest of the future heirs in view, not the exclusion of the person in possession for the time. This may be done by adjudging from the heir in possession the lands, subject to a qualification similar to that inserted in voluntary securities and trust-deeds for creditors, to the effect that the right attachable in consistency with the entail, and nothing more, is to be affected by the diligence. But the terms in which decree is to be sought in such an adjudication require careful adjustment. In a case where the lands were adjudged, and infestment was obtained in the lands, subject to a qualification as here recommended, the adjudger's right was preferred to an infestment in the lands in liferent during the lifetime of the heir in possession, following on a decree of adjudication simply of the heir's liferent right.¹ Whether an adjudication of the heir's liferent right with corresponding infestment would have been objectionable, is not clear. But there is no ground for preferring an adjudication in such terms, to one of the lands, subject to the usual qualification.

The right and interest of the person in possession may not only be adjudged, but may be sold judicially; but the decree of sale must be

¹ Grahame, 14th Nov. 1828, 7 Sh. 13, and 3d Dec. 1830, 9 Sh. 130; affirmed 19th July 1833, 6 Wil. & Sh. App. 518.

qualified in the same manner as the decree of adjudication of the lands or the voluntary deed of security.¹

After the prohibitory clauses are concluded, we meet with the exceptions or reservations therefrom. If the entail is made without express prohibitions against alienation, contraction of debt, and alteration of the succession, there would seem to be an awkwardness in introducing exceptions and reservations; as, in such cases, there is nothing expressed from which to make exceptions or reservations. The clauses may, therefore, in such cases naturally assume the form of powers, which will come to the same thing. But I defer the consideration of these clauses till we have examined the clauses requisite under our older law for making the prohibitions effectual. These are the irritant and resolute clauses, which are now appropriate only to the old entail, the Act of 1848 declaring registration of new tailzies in the Register of Entails, upon express clauses of consent contained in the deed of tailzie, to be equivalent to the irritant and resolute clauses of the old deed.

The object of the irritant clause is to annul acts and deeds of contravention of the prohibitions; and the object of the resolute clause is to resolve or forfeit the right of the contravener. The operation of these two clauses, and the necessity (in point of principle) for both of them, will be illustrated by perusal of Lord Kilkerran's report of the case of Gairdner.² It was there argued, and the view was supported by some of the Judges, that an entail with prohibitory and resolute clauses, but without any clause irritant, ought to be good by Common Law; the prohibition implying that the deeds of contravention should be null. But it was successfully answered that, though prohibitions were valid, (as they then were) against gratuitous acts or deeds, it was contrary to law that they should annul onerous transactions: an onerous transaction must stand, if it is not validly declared to be null: and, with regard to the resolute clause, that 'to incapacitate the heir of entail to affect the estate with debt, without at the same time irritating (resolving or forfeiting) the heir's right in case of contravention, were to impose a condition contrary to law,—that a man should be at the same time fiar, and yet not have power to affect the fee.' On these principles both clauses were there held necessary; and, looking to the Act of 1685, the Court had no alternative but to pronounce them so. But, as the publication of the limited nature of the heir's right is really the point with which third parties are concerned, the registration of the entail was, in 1848, as we have seen, made equivalent to the express irritant and resolute clauses, and is now, by the Titles Acts of 1858 and 1860, made equivalent to the prohibitions against alienation, contracting debt, and altering the succession, as well as to the irritant and resolute clauses.

The principles of strict interpretation have been applied to the irritant

¹ Ferrier, 14th July 1835, 13 Sh. 1121.

² Gairdner, 27th Jan. 1744, M. 15,501.

IRRITANT AND
RESOLUTIVE
CLAUSES.

and resolute clauses as rigidly as to the prohibitions. It is, in the first place, necessary that both the irritant and resolute clauses when expressed should strike at acts of contravention on the part of the institute (if the entailer himself is not the institute, and the deed is granted *mortis causâ*), and of each of the heirs of entail; and that the words employed should embrace or be applicable to the whole lands contained in the entail, or intended to be affected by it. What has been already said as to the strict principle of construction of the prohibitions on this point is equally applicable to the construction of the clauses irritant and resolute; and, although the prohibitions be correctly directed against the institute and all the heirs, yet, if these parties are not all embraced under the words of both the irritant and resolute clauses, the entail will be unavailing as against the acts of any of them in regard to whom these clauses, or either of them, shall be defective.¹

FORM OF
IRRITANT AND
RESOLUTIVE
CLAUSES.

As regards what may be called the subject-matter of the clauses, there are two principles or modes, according to either of which valid irritant and resolute clauses can be constructed,—viz., there may be a clause comprehensively general, or there may be a set of clauses minutely particular. Either, in one short sentence, acts of contravention of all or any of the prohibitions generally may be declared null; or, in a long enumeration, acts of contravention of each of the prohibitions, specially detailed, may be declared so. And, in like manner, it may be briefly and comprehensively declared, on the one hand, that in case of contravention of all or any of the prohibitions, or failure to fulfil all or any of the conditions and obligations, the heir's right shall be resolved and forfeited; or, on the other hand, the same long and minute enumeration may be applied to the prohibitions, etc., in this case as in that of the irritant clause. In principle the one mode, when perfectly carried out, is as good as the other; but 'enumeration, in order to be effective, must be complete and perfect in itself, without other aids;' and, as might be anticipated, there are many cases in which the clause professing to enumerate, or in which, as it is said, 'the entailer has undertaken to enumerate,' has gone imperfectly over the prohibitions, and the result has been that the entail, constructed on that principle, has been found defective. The comprehensive general clauses have thus been found practically the most safe and effectual. Of the comprehensive general clause, and likewise of a correct and sufficient enumeration, we have examples in a case where the resolute clause contained an enumeration, and the irritant clause was general; the latter running thus:—'all 'which debts, facts, and deeds are by these presents declared to be void 'and null,' etc. This was found to apply to all the branches of the prohibitions.² One of the leading cases of entails which professed to enu-

¹ Two of the leading cases on this point are *Elibank*, 21st Nov. 1833, 12 Sh. 74; affirmed 19th March 1835, 1 Sh. and M'L. App. 1; and *Morehead*, 2d July 1833,

11 Sh. 863; as reversed, 31st March 1835, 1 Sh. and M'L. App. 29.

² *Leith Hay*, 20th December 1842, 5 D. 347.

merate, but did not do so correctly, is that of Bruce.¹ In this case the irritant clause ran thus :—‘all which deeds are declared void and null,’ etc. That was a good general irritant clause. Then followed the resolute clause, providing ‘that the institute and heirs who shall contravene and incur the said clauses irritant, or any of them,’—here there was a good comprehensive introduction to the resolute clause,—but the clause went on to say, ‘either by not assuming the name and arms,’ etc. Then there followed a long enumeration of particular acts of contravention ; and the clause concluded by saying ‘that then and in any of these cases the person or persons so contravening, as said is, shall forfeit,’ etc. In the enumeration, however, the prohibition against ‘selling’ was omitted ; and it was found that the estate could validly be sold. Other instances of defective enumeration will be found in the case of Scott,² where, after a prohibition against the three acts of alienating, burdening, or altering the succession, there was this irritant clause,—if any of the heirs ‘shall do anything in the contrair, either by disposing, or committing treason, or any other crime or delict, or by contracting debts, or any other deed,’ ‘the said deeds shall be null.’ The irritant clause was held to be framed on the principle of enumeration ; and, as it did not specify alteration of the succession, it was defective, and the estate was held in fee-simple. And, when the prohibitory clause was directed against ‘selling, disposing, wadsetting, or impignoring,’ and the irritant clause was directed against ‘selling, wadsetting, and impignoring,’ omitting the word ‘disposing,’ it was held that the heir in possession was not effectually barred from granting gratuitous dispositions, and that therefore the entail was of no force.³

The case is different when the word which is omitted in the irritant clause is ‘sell,’ and when there are other words embracing ‘alienation.’ Where the prohibitory clause struck at ‘selling, annailzieing, wadsetting, disposing, and dilapidating,’ all these words were held to be covered by the word ‘disposing’ in the resolute clause.⁴ But, where the general introduction to the irritant and resolute clauses does not say ‘in case of contravention of all the conditions and prohibitions, *by*’ doing so and so ; but ‘in case of contravention of all the conditions, *or of*’ doing so and so ;—the effect of the enumeration, introduced by the disjunctive conjunction *or*, has been held not to qualify or limit the general words. Thus, where the irritant clause, commencing with general terms, ran as follows :—‘If any of my said daughters,’ etc., ‘shall contravene or fail in performance of any of the provisions or conditions above written, or alter the order of succession above set down, or dispone,’ etc., although in the enumeration of particulars, thus following the general terms, the contraction of debt was omitted,—the general clause was held entitled to

¹ Bruce (the Tillicoultry Entail), 15th Jan. 1799, M. 15,539.

² Scott, 6th December 1855, 18 D. 168.

³ Fairlie, 3d March 1857, 19 D. 596 ; affirmed, 28th March 1860, 22 D. (House of Lords Reports) 8.

⁴ Elliott, 15th May 1803, M. 15,542.

effect, and not to be qualified or limited.¹ This is as if the entail had said, generally, 'in case of contravention of all or any of the prohibitions, and particularly, without prejudice to the said generality, in case of altering the succession,' etc., 'or disposing,' etc. In such case an omission occurring in the clause of particulars would not have derogated from the general clause with which it was thus connected. In regard to these clauses, however, as in the case of the prohibitions, it is the protection of the estate that is in view; and it is not necessary to declare acts of contravention absolutely null and void. It is enough if they be so declared 'in so far as they affect the other heirs and the estate,' without expressly saying they shall be void as regards the contravener himself.²

On the other hand, when the irritancy struck at acts of contravention only 'in so far as they might infer action, personal or real, against the next heir or against the lands,' it was held that sales were not effectually prevented.³ The reason is that sales can be competently completed without any action being inferred against either the heirs or estate, viz., by the granting of a disposition with procuratory of resignation, and with or without precept of sasine, which will be made quite effectual in the ordinary way, by charter and infeftment, or by registration, and without any action. Again, however, where the acts of contravention were declared null in so far as they might 'affect, burden, evict, or forfeit' the lands, it was held that the comprehensive word 'affect' was sufficient to express the operation of all the prohibited acts against the estate.⁴

It has already been observed that the clauses irritant and resolute must comprehend all the acts prohibited; and we have a strong illustration of that doctrine in a case where the prohibition was against 'contracting debts, or giving bond or obligation,' and the irritant clause said that in case of contravention 'by contracting debts, the said bonds or obligations made in the contrary shall be null and void.'⁵ This irritant clause did not strike at the debt contracted, or the act of contracting it, only at 'the bonds and obligations;' and it was held that the estate was not protected from debts, even though constituted by bond and obligation, because the irritancy was directed not against the contracting of debt, but against these instruments merely; and a debt contained in a bond or obligation might be a good and valid debt independently of the bond or obligation.

WORDS OF
FLEXIBLE
MEANING.

Another result of the principle of strict interpretation is, that, when a word or term of flexible meaning has once been made use of with a particular meaning distinctly marked, and when the same word occurs afterwards in a doubtful sense, you go back to the first meaning, and

¹ Burden's case, before cited.

² Munro, 15th Feb. 1826, 4 Sh. 467; affirmed 25th July 1828, 3 Wil. & Sh. App. 344.

³ Lord Wharnccliffe, 13th Nov. 1849, 12

D. 1; affirmed 5th July 1850, 7 Bell's App. 132.

⁴ Laurie, 13th December 1854, 17 D. 181.

⁵ Martin, 17th July 1844, 6 D. 1320.

interpret the word when it next occurs by its first meaning. And the legitimacy of such interpretation is obvious; because, if the word was to have had a different meaning, the framer of the deed, it is to be presumed, would have so marked it by some qualifying expression.¹ This rule received effect in a case where an entail declared that it should 'at no rate be allowable to' the heirs 'to sell off or dispose upon any part of the lands and subjects before transmitted, nor to contract debt, or do any other deed whereby the said lands and subjects may be adjudged or evicted from the succeeding members of entail, or their hopes of succession thereto in any measure evaded.' The irritant and resolute clauses then ran thus:--'And if they do in the contrary it is declared, in the first place, that all such debts and deeds shall be intrinsically void and null, and in the next place the contravener shall forfeit,'² etc. Here, on the principle above stated, it was held that the term 'such deeds,' as made use of in the irritant clause, comprehended only the particular class of deeds struck at by the word 'deed' in the prohibition; and, consequently, that there was no effectual irritancy against sale.³ But there is no abstract force or want of force in the word 'deeds;' and, where that word was so placed as necessarily to refer to the whole prohibitions, it was found applicable to sales.⁴

The same principle of strict construction is strongly illustrated by another case, where an entail with valid prohibitions contained an irritant clause striking against 'all deeds to be made or granted.' It was held that written deeds only were here meant; the term 'deeds' being qualified by the expression 'to be made or granted.'⁵

The strict rules applicable to entails further operate to prevent the correction even of obvious omissions in the fettering clauses after the deed of entail has been delivered, or, if granted *mortis causa*, after it has come into operation by the maker's death. Thus, we have a case where the entail declared that 'not only my said lands and estate shall not be burdened with, or liable to, the debts and deeds, crimes and acts, contracted, granted, done, or committed contrary to these conditions and provisions, or restrictions and limitations, or to the true intent and meaning of these presents, shall be of no force, strength, or effect,' etc. etc. Here the clause did not express what was to be of no force, strength, or effect; though plainly the acts of contravention referred to in the immediately preceding context must have been meant. And the House of Lords held the omission fatal; for, as the deed stood, nothing was declared null;—there was no irritant clause.⁶ But where the fetters were

¹ Lord Balgray in Dick, 14th Jan. 1812, F. C.

² Lang, 23d Nov. 1838, 1 D. 98; reversed 16th Aug. 1839, M'L. & Rob. App. 871.

³ The same was decided in Sinclair, 26th Feb. 1841, 3 D. 636.

⁴ Lumsden, 26th Nov. 1840, 3 D. 136; affirmed 18th Aug. 1843, 2 Bell's App.

104. See also Gilmour, 24th March 1853, 15 D. 587; and Mackintosh, 14th Dec. 1855, 18 D. 249.

⁵ Hay, 11th March 1851, 13 D. 945. See also Lord Campbell in Lumsden, 18th Aug. 1843, 2 Bell's App. 115.

⁶ Sharpe, 3d July 1832, 10 Sh. 747; reversed 18th April 1835, 1 Sh. & M'L. App. 594.

directed against the institute by name, and 'the other of tailzie foresaid' (the word 'heirs' being omitted), the defect was held not fatal;—the meaning being plain, notwithstanding the omission.¹ In a case, however, where two distinct and separate declarations or provisions,—one in the form of a condition to possess under the entail, the other in the form of a prohibition against selling or contracting debt,—were referred to in the irritant clause by the term 'provision above set forth,' the Court, disregarding the argument from intention, held that as the word 'provision,' used in the singular number, did not embrace both the condition and the prohibition, and could not with certainty be applied to either, there was no irritant clause applicable to selling or contracting debt.² But where the three prohibitions of the entail were introduced by the words 'And further providing, as it is hereby expressly provided and declared,' etc., all the prohibitions were held to be covered by irritant and resolute clauses, introduced immediately after the prohibitions, and commencing with the words 'which provision, 'immediately above written, if any of the forenamed persons,' etc., 'shall 'happen to contravene.'³

REGISTRATION
OF ENTAILS.

I have noticed that registration in the Register of Entails, and the completion of the entail by infeftment or registration, are essential requisites to the efficacy of the entail. The registration in the Register of Entails is prescribed by the Act of 1685; and the completion by infeftment or registration is a feudal requisite. Mr. Duff says,⁴ 'These conditions'—that is, the obligation to record in the Register of Entails, and to feudalize—'embrace the most essential requisites of the tailzie, and ought to be 'especially in the view of the Conveyancer, both in the preparation of the deed and the completion of the right. The necessity of registering 'the deed on the one hand, and feudalizing the right on the other, 'illustrates, in the clearest manner, the operation of the influences which 'it is the object of these forms to combine, and thus make subservient 'to the purposes of the entailer. Until registration the statutory conditions are disregarded; and without infeftment the feudal rules are not 'fulfilled. A combination of the statutory and feudal forms is thus 'required to make the strict entail a perfect right.' The Act of 1685 provides for the registration of 'the names of the maker of the tailzie, 'and of the heirs of tailzie, and the general designations of the lordships 'and baronies, and the provisions and conditions contained in the tailzie, 'with the irritant and resolute clauses subjoined thereto.' But it has long been fixed that the entail must be recorded *verbatim* and at full length; and, even where part of the entailed lands had been sold by the entailer after making the deed of entail, the Court would not grant authority to omit from the record the description of the lands sold.⁵

¹ Holmes and Campbell, 13th Feb. 1851, 13 D. 689.

² Speid, 21st February 1837, 15 Sh. 618.

³ Preston, 28th Jan. 1845, 7 D. 305.

⁴ Duff's Feudal Conveyancing, p. 345.

⁵ Moore, 28th November 1821, 1 Sh. 173.

But a critical objection to the warrant to record and a trivial error in transcribing the resolute clause have been disregarded.¹

In order to registration in the Register of Entails, a petition must be presented to the Junior Lord Ordinary, praying for warrant to record.² This petition may be in name of any substitute heir of entail, however remote.³ But the principal entail must be produced with the petition.⁴ If the deed has previously been recorded in any register for preservation, warrant on the custodier will be granted for its transmission to the process of registration in the Register of Entails, to be seen and then recorded in the Register of Entails.⁵ If the deed is not recorded for preservation, and the petitioner has not power over it, letters of incident diligence will be granted for recovering it.⁶ But, if an heir-female who is married applies to have the entail recorded, she ought to have the consent of her husband to her petition, unless his *jus mariti* and right of administration in regard to the estate have been excluded; or she should have a curator *ad litem* appointed to concur with her.⁷ It has been questioned, but not decided, whether an heir whatsoever of the entailer, under a deed with an ultimate destination to his heirs whatsoever, can apply for registration of an entail.⁸

In regard to new entails, the Act of 1848, as already mentioned, introduced an altogether new principle; providing, by sect. 39, that, in any tailzie containing an express clause authorizing registration in the Register of Entails, it should not be necessary to insert any irritant or resolute clauses in order to render such tailzies effectual in terms of the Act of 1685; but that such clause of registration should have, in every respect, the same operation and effect as the most formal irritant and resolute clauses, duly applied to every prohibition, condition, and limitation contained in such tailzie. The same section enacts that such clause, authorizing registration in the Register of Entails, shall be engrossed as part of the tailzie in the Register of Entails, when the tailzie is recorded therein; and shall also be inserted or duly referred to in all procuratories of resignation, charters, decrees of special service, precepts, and instruments of sasine following on the tailzie, in the same manner, or as nearly as may be in the same manner, as irritant and resolute clauses are now required to be so inserted or referred to. The registration of the new entail was thus made to operate not only the publication of the restraints imposed upon the institute and heirs, but the riveting of them in the appropriate technical manner; and now, by the Titles Acts of 1858,⁹ sect. 18, and 1860,¹⁰ sect. 12, the registration is made further to impose the restraints against alienation,

EFFECT OF
CLAUSE OF
REGISTRATION.

¹ Norton, 6th July 1852, 14 D. 944; affirmed 22d May 1855, 2 Macq. App. 205.

² 20 & 21 Vict. c. 56, s. 4.

³ Erskine, iii. 8. 26; Nairne, 10th March 1757, M. 15,605, and 5 Br. Sup. 335.

⁴ Spittal, 3d Aug. 1781, M. 15,617.

⁵ Campbell, 14th Nov. 1748, Elchies, Tailzie, No. 35.

⁶ Ker, 7th July 1804, M. 14,984.

⁷ Hamilton, 21st March 1777, 5 Br. Sup. 625.

⁸ Jessop, 7th Feb. 1822, 1 Sh. 294.

⁹ 21 & 22 Vict. c. 76.

¹⁰ 23 & 24 Vict. c. 143.

contraction of debt, and alteration of the succession, as well as to rivet them.

DATE OF
REGISTRATION.

The date of registration is not the date of actual entry in the register, but the date of the warrant authorizing registration; and it is only from the date of registration, and not from the date of presenting the petition to record, or any date prior to registration by the granting of the warrant, that publication is held to have taken place.¹

UNRECORDED
ENTAILS.

Unrecorded entails have no protection from the Act of 1685. Though they have been feudalized, the lands can be adjudged by the creditors of the heir in possession.² And the creditors can adjudge after the entail is recorded, provided their debts were contracted prior to the registration;³ or even after the heir who contracted the debt has been found by formal decree of irritancy to have forfeited his estate.⁴ Moreover, the heir in possession under an unrecorded entail is entitled to sell,⁵ and is under no obligation to re-invest the purchase-money.⁶ And the heir under such entail, and his representative after his death, are not liable in damages for acts done in contravention of the unrecorded deed.⁷

As regards the effect of feudalizing the entail, and the due insertion of the conditions in the titles following on the deed of entail, we are to distinguish between cases where the institute, or heir in possession, is the heir of the last investiture, and where he is not so. In the former case, he can make up titles as heir of that investiture, passing by the entail even if it is recorded in the Register of Entails; and in virtue of these titles he can sell the estate, and grant a valid conveyance to a purchaser.⁸ And his creditors can attach the estate by adjudication, provided they obtain decree of adjudication before the entail is feudalized. If the decree proceeds against an heir unentered it must be pronounced during the lifetime of such heir.⁹ But when the institute, or heir of entail, is not heir of the last investiture, the rule is different as long as the entail is not feudalized. The right of such institute or heir—being founded solely on the entail, and consisting in fact of the deed of entail only—is strictly personal, and subject to all the conditions under which it is granted. He cannot sell, nor can his creditors attach the estate, except through that personal right, and under all its qualifications; and, in such case, the estate is protected so long as the entail is unfeudalized, even if the entail is not recorded in the Register of Entails. What the heir can sell, and his creditors can take, is only his life estate. This arises from the general principle

¹ Williamson, 3d Dec. 1851, 14 D. 127.

² Willison, 8th Dec. 1724, M. 15,371.

³ Rose, 11th June, 1828, 6 Sh. 945; affirmed 30th Aug. 1831, 5 Wil. & Sh. App. 359.

⁴ Munro or Ross, 9th Feb. 1836, 14 Sh. 453.

⁵ Grahame, 11th Dec. 1829, 8 Sh. 231.

⁶ Earl of Eglinton, 22d Jan. 1842, 4 D.

425; affirmed 18th Aug. 1843, 2 Bell's App. 149.

⁷ Marquis of Queensberry, 7th March 1828, 6 Sh. 706; reversed 16th July 1830, 4 Wil. & Sh. 254.

⁸ Kennedy, 11th Feb. 1829, 7 Sh. 397.

⁹ Douglas, 22d Feb. 1765, M. 15,616; and Russell, 31st Jan. 1791, M. 10,300, Bell's 8vo Cases, 166.

applicable to personal rights.¹ The case is different, even though the institute or heir is a stranger, as soon as his right is feudalized. Previously,—that is, before his right was feudalized,—he could accomplish the infestment or registration of his disponent only by assigning to him the deed of entail in usual form, that being his own sole and exclusive title. Now, he is the feudal proprietor with the corresponding rights and powers. Every feudal proprietor who is not validly restrained can, of himself, in virtue of his own real right, grant a real right to another at his pleasure; and, the entail in the case supposed not being recorded in the Register of Entails, third parties are not affected by its conditions. The institute or heir can therefore, of himself, grant a conveyance with executive clauses, which his disponent can register in the Register of Sasines, or in virtue of which the disponent can be validly infest; and, on the same principle, the creditors of the institute or heir can attach the estate. He is the feudal proprietor; and, the entail being unrecorded in the Register of Entails, they have no concern with it. He is, as regards them, a proprietor registered or infest in fee-simple. The only exception to this rule is that an entail constituted by a mutual and onerous deed is effectual, when feudalized (although unrecorded in the Register of Entails), to exclude creditors of the heir in possession whose debts have not been made real before the entail has been registered in the Register of Sasines, or followed by infestment, if such debts were contracted after the date of the entail. This was found in the case of *Agnew*,² where it was decided that, in such circumstances, the heirs-substitute acquired by the onerous entail a personal right to the estate, as creditors whose right was made real by the infestment on the entail; and that it was not competent to attach the estate for personal debts contracted by the entailer subsequent to the date of the entail, and not made real before the date of the infestment on the entail.

As regards the insertion of the conditions of entail in the investitures following on the deed of entail, the object of such insertion is the publication of the conditions in the Register of Sasines. Such insertion was required by the Act of 1685, in consistency with one of the leading principles of Scottish land rights—that there can be no valid incumbrance on lands, or qualification of the title to lands, which does not enter the Register of Sasines. It is not, however, necessary to insert the conditions in the retour or decree of the general service of the heir by whom the entail is to be feudalized.³ The general service is a mere connecting link, or warrant transferring a personal right, but incapable by itself of authorizing a real right; and it never contains the conditions.⁴ Until the passing of the Conveyancing Acts of 1847, the insertion of the con-

¹ *Dickson*, 24th Feb. 1801, M. App. Tailzie, No. 7, Lord Braxfield in *Russell's* case.

² *Agnew*, 31st July 1822, 1 Sh. App. 320, reversing the judgment of the Court

of Session. This is known as the *Sheuchan* entail case.

³ *Stewart*, 1st Feb. 1726, M. 7275; reversed 17th Feb. 1737, 1 *Craigie* and *Stewart's* App. 233.

⁴ *Erskine*, iii. 8. 30.

ditions in all the proper feudalizing titles following on the entail was indispensable. And where an essential omission, in reference to the prohibition to contract debt, occurred in the feudalizing titles, the estate was held open to the diligence of creditors.¹ At the time of the judgment in this case (1846) the omission in the titles of the effective words in any one prohibition opened the estate only to acts of the kind not duly prohibited; but any essential omission now makes the estate a fee-simple.² Under our old law, the omission to insert the conditions was a ground on which to find that the heir had forfeited the estate.³ Now, if the conditions have been duly inserted in the first feudalizing titles, or if the entail is registered in the Register of Sasines, and is also recorded in the Register of Entails, a reference in the subsequent titles to the conditions as inserted in the entail or feudalizing sasine is, by the Conveyancing Acts of 1847, equivalent to full insertion in the subsequent titles.

In the Style Book⁴ it is said to be unnecessary to insert the conditions *ad longum* in the instrument of sasine by which the entail is feudalized, if the entail has been previously recorded in the Register of Entails; and reference is made to the Transference of Lands Act of 1847⁵ as the authority. But it does not seem to be clear that the sections here referred to extend to the case of the feudalizing sasine. I believe that, in practice, it has been usual to insert the conditions *ad longum* in that sasine; and I recommend that their full insertion should be made in such sasine, or the corresponding notarial instrument, if any. But in many cases registration in the Register of Sasines will now supersede an instrument of sasine or notarial instrument. The omission of the reference, when that is sufficient, or of the whole conditions, when reference is not sufficient, would have the same effect now as the omission to insert *ad longum* had by our older law.

As regards new entails, the only point specially to be kept in view in connexion with the insertion of the conditions, etc., is, that in first feudalizing the entail not only the conditions, etc., but also the consent to registration in the Register of Entails, must be inserted in the sasine or notarial instrument, or charter and sasine or notarial instrument, if any, as the case may be; and in all subsequent titles the conditions, etc., and consent to registration, must be duly referred to.⁶

ENTAILER'S DEBTS.

The estate, though validly entailed, and secured against the future contraventions of the institute and heirs of entail, is liable to the debts contracted by the entailor and his predecessors, whom he represents. The institute and heirs of entail in their order, as receiving the rents, are the proper debtors in the interest of these debts; and, if they are the general representatives of the entailor, they are the proper debtors in the

¹ Cathcart, 1st July 1846, 8 D. 970.

² Entail Amendment Act, s. 43; and Holmes and Campbell, 13th Feb. 1851, 13 D. 689, and other cases already referred to, decided in terms of that Act.

³ Garnock, 28th July 1725, M. 15,596.

⁴ Juridical Styles, i. 273.

⁵ 10 & 11 Vict. c. 48, ss. 4 & 5.

⁶ Entail Amendment Act, s. 39.

principal also.¹ They would be so, likewise, if they were to disentail and acquire the estate in fee-simple. But so long as the estate remains entailed they are not liable as the proper debtors in the principal. They may, indeed, be compelled by the creditors to pay the debts, because they are in possession, and administrators of the estate which forms the proper fund of payment; but if the payment is made out of their own proper funds, and if they do not take from the creditors absolute and simple discharges of the debts, the interest only during their possession, and not the principal sums, will be extinguished. The principal sums can be re-issued to third parties by the persons paying them at their pleasure, and will fall to the heirs-at-law or general representatives of such persons on their death, if not re-issued.² If, however, the heir, though not liable as the proper debtor, takes an absolute and simple discharge of the debt on making payment, he has made a present of the debt to the heirs of entail. The debt is discharged, and cannot again be set up or re-issued.³ On the other hand, though the heir of entail in possession is bound to keep down the interest upon entailer's debt, and is the proper debtor to that extent, yet, as a general rule, if he fails to pay, the interest, equally with the principal, forms a debt on the estate.⁴ From this rule, however, we are to except the interest on bonds and dispositions in security granted under the Rutherfurd Act, sects. 21 and 18, for the amount of provisions to children, or for capital sums, in lieu of the annualrents allowed by sect. 17. The Act provides that no more than two years' bygone interest on such bonds shall affect the fee of the estate. Neither can the estate be charged with more than two years' bygone annualrents and interest thereon.

CHAPTER II.

ENTAILS, though duly constituted in all respects, may be brought to an end in various ways; and, *first*, by prescriptive possession upon an adverse or fee-simple title. HOW ENTAILS
MAY BE PUT AN
END TO.

If the heirs of entail establish in their persons titles adverse to the entail, and possess exclusively under these for forty years uninterruptedly, the effect will be to do away with the entail by prescription. BY PRESCRIP-
TION. And the same result will follow possession for the same period in virtue

¹ Forbes & Co., 17th Nov. 1802, M. App. Tailzie, No. 10.

² Murray, July 1748, 5 Br. Sup. 764; Ker, 15th Feb. 1758, M. 15,551; Lawrie, 7th Dec. 1830, 9 Sh. 147; and Welsh, 11th Feb. 1837, 15 Sh. 537.

³ Duke of Roxburghe, 14th Dec. 1815,

F. C.; affirmed 9th March 1825, 1 Wil. & Sh. App. 41.

⁴ Campbell, 29th Nov. 1815. F. C.; Erskine, 7th July 1829, 7 Sh. 844; Sands, 7th July 1835, 13 Sh. 1040; and Duke of Richmond, 2d Dec. 1837, 16 Sh. 172.

of the entail, and of titles proceeding thereon in a feudal sense, but in which the conditions of the entail are not duly inserted or referred to.¹ In either case, however, the heir so possessing is committing a contravention, and is therefore liable to have his right resolved and forfeited; and the substitute heirs have right at Common Law, and without express power in the deed of entail, to enforce the obligation to possess under the entail.²

SECOND
ENTAIL.

An entail will also be extinguished by prescriptive possession on an entail of later date, though containing the same lands and the same conditions. This will happen though the first entail has been duly recorded in the Register of Entails,³ or has been both recorded in that register and feudalized.⁴ The second deed, however, must be a complete and independent entail:—a mere propulsiion of the fee in terms of the original entail, and with due and sufficient reference thereto, is not an adverse title.

HEIRS OF
ENTAIL EX-
HAUSTED.

Secondly, Entails will come to an end when there is no existing heir of tailzie entitled to claim benefit under their restrictions,—that is, when all the heirs of entail substituted to the institute die out,⁵ or when the estate devolves upon the last person called under the deed as an heir of entail. It is usual in entails to close the destination with a clause in favour of the heirs whomsoever, or heirs and assignees whomsoever, of the entailer. But such parties are not heirs of entail; and the last substitute heir of entail is entitled to alienate or burden the estate, or to alter the order of succession, either for onerous causes or gratuitously.⁶ Nor does it make any difference that heirs-portioners are excluded in the destination to heirs whomsoever. The entail is not made in order to protect the heirs whomsoever, only the heirs of entail.⁷ It is not competent, however, to make an entail simply in favour of the institute and his lawful heirs for ever in regular succession. This is equivalent to a destination to the party and his heirs whomsoever, which is not an entail.⁸

HEIRS-
PORTIONERS.

Thirdly, When heirs-portioners succeed, the entail comes to an end. The nature and purpose of an entail being to preserve the estate as one unbroken subject in the person of the member in possession, it is usual in entails to give the right to heirs-female in their order of seniority equally as to heirs-male. But if that is not done the actual devolution

¹ Cathcart and Holmes, *supra*.

² Maule, March 1782, M. 10,963.

³ Inglis, 18th Nov. 1851, 14 D. 54.

⁴ Earl of Eglinton, 22d Jan. 1842, 4 D. 425; affirmed 8th Aug. 1843, 2 Bell's App. 149; Stewart, 23d May 1844, 6 D. 1073; affirmed 3d July 1846, 5 Bell's App. 139.

⁵ Henry, 13th June 1832, 10 Sh. 644.

⁶ Erskine, iii. 8. 32; Earl of March, 27th Feb. 1760, M. 15,412; Steele, 15th Feb. 1853, 15 D. 385. See Collow, 23d Feb. 1866, 4 Macph. 465, in which it was

held that the final destination in an entail to the entailer's 'own nearest of kindred' and their heirs and disponees whomsoever was a good tailzied destination, effectual against prior substitutes,—the expression, 'my own nearest of kindred,' limiting the succession to those nearest in blood to the entailer.

⁷ Gordon, 19th Dec. 1852, 14 D. 269; Primrose, 9th Feb. 1854, 16 D. 498; Gibb, 29th May 1857, 19 D. 768.

⁸ Leny, 28th June 1860, 22 D. 1272. See Gordon, 2d March 1866, 4 Macph. 501.

of the succession upon heirs-portioners will evacuate the entail. Its clauses are applicable only where one single heir is in possession. They are not applicable when the succession devolves upon two or more heirs entitled to possess the estate jointly, and to have the estate judicially divided between or among them. This result has uniformly been assumed.¹

But the non-exclusion of heirs-portioners in a succession which embraces heirs-female will not necessarily of itself void the whole tailzie. Tailzies are not necessarily evacuated by containing within themselves, as all entails necessarily do, the elements of their ultimate extinction. They are effectual so far and so long as they apply to the members as sole proprietors in the order of the destination. The fetters will necessarily fly off when the estate shall have devolved upon a plurality of heirs simultaneously; but they continue binding whilst the destination supplies an heir who has, or may have, a successor entitled as a proper substitute to enforce their operation.²

But *Fourthly*, The leading mode in which practically entails are brought to an end is that provided by the Act of 1848, and extension thereof by the Act of 1853.³

By the Act of 1848, every heir in possession, when of full age, may DISENTAILS. acquire his estate in fee-simple by applying to the Court (now to the Junior Lord Ordinary) for authority to execute, and by executing and recording in the Register of Entails, under the authority of the Court, an Instrument of Disentail of the estate. In the case of old entails (entails prior to the Act of 1848), the heir in possession will be entitled to disentail—(1.) If he is the only existing heir and unmarried; or (2.) If born subsequent to the date when the Act came into operation (1st August 1848); (3.) If born before the Act came into operation, then with consent of the heir-apparent (that is, the heir whose right, if he survives, must take effect), and such heir-apparent being born after the Act came into operation, and being not less than twenty-five years of age; (4.) Again, if the heir in possession be born before the Act of 1848 came into operation, then, further, he may disentail with consent of the three nearest heirs, who at the dates of their consents, and of the application for authority to disentail, are for the time entitled to succeed to the estate in their order successively immediately after the heir in possession; or with consent of the whole heirs in existence if less than three; or (5.) Such heir in possession may disentail with consent of the heir-apparent under the entail, and of the heir who will be heir-apparent next after him,—that is, the heir in possession, with consent of his eldest or only son, and of that son's eldest or only son.

But in all cases the nearest heir of entail for the time entitled to succeed to the estate immediately after the heir in possession, when any such

¹ Erskine, iii. 8. 32; Mowat, 6th Feb. 1823, 2 Sh. 186; noticed in Mure, 16th Feb. 1837, 15 Sh. 581; affirmed 18th May 1838, 3 Sh. & M'L. App. 237; Earl of March as above; Sprot, 22d May 1828,

6 Sh. 833; Hunter, 11th Dec. 1834, 13 Sh. 185; see also Gibb's case, before cited.

² Mure's case.

³ 16 & 17 Vict. c. 94.

heir exists, must, in order to the efficacy of his consent, be of the age of twenty-five years complete, and not subject to any legal incapacity.

In the case of new entails, the Act authorizes disentail by the heir in possession alone, when of lawful age, if born after the date of the entail; and by such heir, when of lawful age, if born before the date of the entail, on obtaining the consent of the heir-apparent, such heir-apparent being born after the date of the entail, and having attained twenty-five years of age.

As to both old and new entails, the consents by heirs of entail to disentailes are declared irrevocable.¹ The date of presenting the application is to be held the day on which the first interlocutor under the same has been pronounced; and no alteration of circumstances, occurring subsequent both to the date of presenting the application, and the last date of the consents,—whether by the birth of any intervening heir, or by the death of the consenting heir, or otherwise,—has any effect on the rights of the party presenting the application, or on the procedure therein.²

The mode of proceeding in cases of disentail is pointed out by the Act of 1848, and the extension Act of 1853, which last authorizes the execution of the instrument of disentail before presenting the application to the Court; and in such case the Court authorizes only the recording of the instrument.

A form of the instrument of disentail is appended to the Act of 1848. It is very short, bearing that, at a place and date specified, in presence of a notary-public and subscribing witnesses, the heir in possession of the lands takes instruments in the hands of the notary that the lands are now held by him free of the conditions of the entail, by virtue of the Act. Then there is the consent to registration in the Register of Entails and Books of Council and Session and others competent, and a testing-clause in common form. The party signs, and also the notary, who adds '*N. P.*' to his subscription, and two witnesses subscribe as usual. In cases where consents are necessary, they are to be as nearly as may be in the form given in the Act of Sederunt, 18th November 1848. The instrument of disentail, when executed abroad, may be so in presence of a British consul, who is authorized to act in all matters requiring a notary.³

The disentail, however, requires the sanction of the Court of Session, to be obtained by summary petition of the heir in possession, which may be for authority either to make and record it, or simply to record it, if it has been made before the application is presented, as authorized by the Act of 1853, sect. 4. The requisites of the petition, however, and the procedure under it, I need not here enter upon.

The instrument of disentail and the relative decree of the Court must be recorded in the Register of Entails. Until such registry takes

¹ Act of 1848, s. 50.

² Act of 1853, s. 19.

³ 6 Geo. IV. c. 87, s. 20, Cuninghame, 15th Feb. 1850, 12 D. 743.

place, it would appear that the disentail is not effectual; and, if the heir who petitions shall die before the proceedings are finally complete, the next heir cannot be sisted in his place so as to continue and carry them out.¹

It is usual to register the instrument of disentail in the Books of Session for preservation, and, along with the decree, in the Register of Sasines for publication; as it is just a discharge of real burdens, and, you will observe, it is no more. It makes the estate fee-simple, inasmuch as it authorizes the heir in possession to deal with the estate as he pleases. But it does not operate any change of the old destination; and, notwithstanding the disentail, the estate will devolve on the heirs of entail if the destination is not competently altered.

The Act of 1848 (by sect. 4) confers on heirs of entail, who are entitled to petition for disentail, power to sell, alienate, dispoise, charge with debts and incumbrances, lease and feu entailed estates, in whole or in part, either unconditionally or subject to conditions, etc., with the same consents as are required for a disentail, and, with the authority of the Court, to execute all necessary deeds.

It not unfrequently happens that old entails are terminated on condition, *inter alia*, that new entails shall be executed; an arrangement which can be carried out by a disentail and new entail. But as soon as the lands are disentailed they will be open to the diligence of creditors, whereby the new entail may possibly be subjected to a burden not contemplated. If the new entail is executed, and recorded in the Register of Entails, and followed by registration in the Register of Sasines, or infeftment, before the lands are attached by the diligence of adjudication, the heirs of entail will be preferable to the creditors; because the new entail is the result of an onerous obligation in favour of such heirs, and the obligation in their favour has been first made real and effectual. But delay may possibly arise in connexion with the new entail; and all risk of difficulty can be excluded by making use of sect. 4 of the Act of 1848. In place of disentailling and making a new entail, the heir in possession can simply make the new entail. The new deed will be recorded in the Register of Entails, and then completed by registration in the Register of Sasines, or by infeftment. In that way the estate will be subject to the old entail until it is fully and completely brought under the fetters of the new deed.

By sect. 5 of the Act of 1848, power is given to the heir in possession to make excambions of entailed lands for other lands, with consents and with the authority or approbation of the Court as in the other cases; but without requiring that the heir next in the order of succession shall be twenty-five years of age.

Sects. 6, 7, 9, 10, and 11 of the Act of 1848 make provision for the protection of creditors under entailer's bonds or the like, into which I need not particularly enter.

¹ Scott, 16th July 1850, 12 D. 1256.

When there are creditors in personal debts, it is usual for the Court to require them to consent to the disentail, or sale, etc., or to insist on heritable security being given for their debts.

And when the heir in possession under an old entail, or the heir-apparent, shall together or separately have secured, by obligation in any marriage-contract, the descent of such estate upon the issue of the marriage in reference to which such contract is entered into, it shall not be competent for such heir or heir-apparent, or either of them, to apply for or to consent to the disentail of the estate, until there shall be born a child of the marriage capable of taking the estate in terms of the contract, and who, by himself or his guardian, shall consent to the disentail, or until such marriage shall be dissolved without such child being born; unless the trustees named in the contract, or the parties at whose sight the provisions of the contract are directed to be carried into execution, shall concur in the application or consent.¹ But this clause was held not to prevent a disentail by the heir in possession, with consent of the heir apparent, and the heir who would be heir-apparent in his order, although, by the contract of marriage of the heir-apparent, provisions had been granted to his wife by the heir in possession, and the heir-apparent himself had become bound, on his succeeding to the estate, to grant provisions to his younger children.² These provisions were to be defeated, or the granting of them rendered impossible, by the disentail; but they did not secure the descent of the estate upon the heir of the marriage. The wife, and also a tutor *ad litem* of the heir-apparent, who was a pupil, and the parties at whose sight it was stipulated that execution should pass for the provisions to the wife and children, consented to the disentail; and the consent of the heir-apparent was held to be competent and effectual.

CONSENT OF
GUARDIANS.

According to the ordinary rules of law in favour of pupils and minors, in reference to acts done to their prejudice during their nonage, consents to disentail executed on behalf of such parties would be open to reduction on the ground of minority and lesion, until the parties should attain twenty-five years of age; but such operation of this rule would have made the Entail Amendment Act in many cases almost nugatory; and, by sect. 31, power is given to the Court to appoint tutors or curators *ad litem*, or curators *bonis*, or other guardians, to pupils or minors, or other incapacitated persons; which guardians shall be charged with the interest of their wards, in reference to the applications, and shall be entitled to act and give consents for them. And no guardian who may so consent shall incur any responsibility on account of such consent, in respect of any alleged error in judgment or inadequacy of consideration, or want of consideration, unless it shall also be alleged and proved that he acted corruptly in the matter. And the consent of the guardian is declared in all respects as effectual as if the same had been given by the heir himself when of full age and of legal capacity. But no heir in possession, or whose own consent shall be required in the application, shall be entitled

¹ Act of 1848, s. 8.

² Maxwell, 27th Feb. 1857, 19 D. 571.

to give consent on behalf of any other party in reference to any application for disentail of the estate. But by the Act of 1853, sect. 18, minors of the age of fourteen, or upwards, are authorized to appear and oppose the reception of the consent of their guardians on their behalf. There are various other particulars, both in the Act of 1848, and that of 1853, having in view the security of titles, and of the transactions founded on disentailets, and other procedure under the Acts; but into the details of these it is unnecessary here to enter.

Hitherto we have been considering entails, the provisions of which have been duly observed; and we shall now consider the consequences of contravention when it occurs.

Generally, the contravening heir forfeits for himself alone, and not for his descendants;¹ and though the forfeiture declared by the Act of 1685, in case of non-insertion of the conditions of the entail in the subsequent titles, is directed against the contravener and the heirs of his body, such forfeiture is held limited to the contravener himself when the entail does not adopt the words of the Act.² The penal consequences of an act of contravention are purged by the performance of the stipulated condition.³ They may also be purged by the extinction or expiry of the right granted contrary to the prohibitions.⁴ And when an heir had contravened, by making up fee-simple titles, he was permitted to purge the irritancy by expeding a new title in terms of the entail,—finding security at the same time that the estate should not be burdened by debts contracted during the subsistence of the fee-simple title.⁵ But after the death of an heir who had contravened the prohibition against alienation, by granting leases of an unusual duration, the power of purgation which would have been competent to the heir in his lifetime was not allowed the tenants.⁶

Generally, any subsequent heir may pursue a declarator of irritancy on contravention without calling intermediate heirs.⁷ But entails sometimes declare that the contraveners shall forfeit not only for themselves, but for the heirs of their bodies. In such cases an heir descended of the contravener has no interest to declare the forfeiture, and is excluded from so doing.⁸ In a case where there was a similar declaration, a different view prevailed; but the action was pursued with concurrence of a substitute not in the line of the contravener's descendants.⁹ The

¹ Gordon, 14th Nov. 1749, M. 15,384.

² Bontine, 2d March 1837, 15 Sh. 711; affirmed 6th August 1840, 1 Rob. App. 347.

³ Gordon, 23d July 1738, M. 7281; Ross, 18th Nov. 1766, M. 7289; Abernethie's case, *infra*.

⁴ Mackay, 23d Nov. 1798, M. 11,171.

⁵ Abernethie, 20th June 1837, 15 Sh. 1167; affirmed 11th August 1840, 1 Rob. App. 434.

⁶ Queensberry Executors, 6th July 1820,

F. C.; affirmed 2d July 1821, 1 Sh. App. 59; Earl of Wemyss, 2d Feb. 1821, F. C.; Hislop, 2d July 1821, 1 Sh. App. 64.

⁷ Simpson, 6th Jan. 1697, M. 15,353; Irvine, Jan. 1723, M. 15,369; Dundas, 29th Nov. 1794, M. 15,430.

⁸ Gordon, 14th Nov. 1749, M. 15,384; Gilmour, 6th March 1801, M. App. Tailzie. No. 9.

⁹ Turner, 17th Nov. 1807, M. App. Tailzie, No. 16; affirmed 1st July 1813, 1 Dow's App. 423.

penal consequences of contravention cannot be enforced after the death of the contravener, even if the forfeiture is directed against him and his descendants.¹

As regards third parties, the deeds of contravention are not in themselves null : they flow from the feudal proprietor, and being exceptionable by force of Statute only, not intrinsically null, they are effectual until reduced.² And the right of reduction of the deed of contravention is independent of the right to declare the forfeiture of the contravener's right. The heirs-substitute may enforce either right or not as they choose ; and the right to reduce deeds of contravention can be exercised after the death of the contravener.³

Notwithstanding the contravention and forfeiture, however, it has been always held that acts of ordinary administration done before contravention,—*e.g.*, leases granted to tenants, and provisions to wives and children,—remain valid. It was at one time questioned whether voluntary securities granted over the estate, to subsist during the lifetime of the heir, would subsist after his forfeiture. But the Entail Amendment Act (sect. 40) exempted from the effects of the irritancy the purchasers or creditors under deeds granted before execution of the summons of declarator of forfeiture ; provided such deeds were validly granted in consistency with the provisions of the entail.

CHAPTER III.

I PROCEED now to the subject of trust-deeds for purposes connected with entails.

These may be divided into two classes :—(1.) When an entail has been already executed, and the estate is burdened with debt which the entailer wishes to be paid off, either out of the rents, or by selling part of the lands ; and (2.) when the testator has resolved on making investments in lands to be entailed, either as a separate estate or in addition to an existing estate.

In the former case, the radical and proper title to the estate is conferred by the deed of entail, and titles following on it ; and the trust-deed and titles following on it operate merely to create a burden, and as a qualification of the conveyance made by the deed of entail, except so far as lands shall be sold under the powers of the trust-deed, in regard

¹ Mackay & Turner as above ; Mordaunt, 9th March 1819, F. C., opinion of Lord Robertson.

² Agnew, 23d June 1813, F. C. ; and Sandford on Entails, p. 276, *et seq.*

³ Mordaunt as above, and sequel, 5th July 1822, 1 Sh. App. 169.

to which lands that deed forms a title. It is held that the two sets of TRUST-DEEDS. titles—one in the trustees in fee-simple, with power of sale it may be, the other in the persons of the institute and heirs of entail, under the fetters of the entail,—are not feudally inconsistent; the right of the members of tailzie being suspended by the operation of the trust, or excluded, so far as sales shall take place, but obtaining full effect as to all the lands not sold, whenever the purposes of the trust are fulfilled.¹

The structure of the trust-deed as a conveyance of land, likewise the ordinary powers of management to be conferred on the trustees, and the indemnity clauses, are all in this case very similar to those in ordinary *mortis causâ* trust-deeds. The purposes of the trust-deed granted in connexion with the entail will be the payment of expenses of management, public and parish burdens, and also proper yearly charges; then a yearly allowance to the institute or heir in possession during the subsistence of the trust; for which period he will also usually be allowed the free use and possession of the mansion-house, if there is one, and the pleasure-grounds, and such other subjects as are necessary for the comfortable occupancy of the house. Provision will then be made for the expenses of repairs and improvements on the estate, and for keeping up the mansion-house and place. The residue of the rents, and the proceeds of lands sold, will be applicable in payment of the capital of the debts affecting the estate; and when the whole debt is paid the trust-right will be declared to cease and expire as to the lands remaining unsold. But it is usual and proper to require from the trustees, on the one hand, a renunciation in favour of the heirs of entail of their right, so far as affecting the lands remaining unsold, and from the heir in possession, on the other hand, a discharge and ratification of the trustees' whole actings and intromissions before the trustees cede possession of the estate; and as the granter of the discharge is only an heir of entail, and not entitled by law to bind succeeding heirs, it will be necessary, in order to make his deed fully effectual to the trustees, to declare that in granting such deed he shall have power to bind the whole heirs of entail as well as himself. Where there is no declaration to that effect, I apprehend that the proper remedy is for the trustees to call all parties into Court, and obtain a judicial discharge in a multiplepointing and exoneration. In that process any renunciation required of the trustees in favour of the heirs of entail will be produced and adjusted.

Such deeds having reference in general to the management of an estate during a series of years, it is to be expected that unlooked-for cases will not unfrequently have to be disposed of by the trustees. These are often very embarrassing; and it is desirable in framing the deeds of trust to give the trustees as large discretionary powers as possible. For example, necessity may arise for repairing or renewing farm buildings. The heir of entail, being a mere life annuitant, cannot provide the funds. The trustees may view the outlay as practi-

¹ Melville, 8th Feb. 1838, 16 Sh. 457.

cally matter of necessity; but it may be difficult, after a series of years, and when the occasion for the new buildings has been long out of sight and forgotten, to make a succeeding heir of entail understand that the necessity existed, or that a smaller outlay would not have sufficed. In such trusts, therefore, the trustees ought always to have ample power at their own discretion to repair or renew farm buildings, and to apply the capital of the trust-funds so far as necessary for that purpose, they being declared the sole judges as to the necessity. At the same time, these powers should be used with great discretion; and the best evidence should be preserved of the absolute need of the repairs or renewal which takes place. The trust-deed should express whether the trustees or the heir of entail shall have power to cut wood and receive the price thereof, and to enter vassals and receive entry-money, and which of them shall present ministers to churches, if the estate comprehends any rights of patronage. It is also necessary to keep in view that the heir of entail may not be in a position to grant provisions to his wife and younger children unless specially empowered; and, if it is intended that he shall have power to grant such provisions, the trust-deed should expressly say so, and declare the provisions so granted to be burdens which the trustees shall be bound to satisfy in the same way as the truster's debts.

The trust-deed must be followed by registration in the Register of Sasines, or by instrument of sasine, or notarial instrument, in favour of the trustees, as in the case of an ordinary *mortis causa* trust-disposition.

Trust-deeds of the second class, viz., of lands to be entailed, and of money to be invested in the purchase of lands to be entailed, require a more full examination.

When money only is conveyed, it not unfrequently happens that there is an existing entailed estate, and that the truster's object is to make an addition thereto, by having lands purchased and entailed by the trustees in conformity with the existing entail. In such cases the trust-deed will narrate the entail, and the testator's purpose that any lands which he may afterwards purchase shall be settled in terms thereof, and that his estate (other than the entailed estate and lands to be afterwards purchased) shall be realized, and the proceeds applied in the purchase of other lands, to be entailed in like manner with the estate already entailed. The truster will therefore dispoise his whole estate, heritable and moveable (other than the estate already entailed), to the trustees, and direct them to realize his moveable estate, other than the furniture and other effects in his mansion-house, if there is any, and which, upon his death, shall be made over to the heirs of entail in the entailed estate. There ought to be a direction also to sell such lands, if any, as fall under the trust, and it is not intended in any event to entail. The deed will then direct the trustees to apply the estate conveyed, and prices and proceeds thereof, so far as sold,—In payment (1.) of the expenses of management; (2.) of the entailor's debts and funeral expenses; (3.) of

legacies to be granted; (4.) provision may be made for payment of the TRUST DEEDS. expense of improvements on the entailed estate, or on the lands to be purchased by the truster during his life, or on the lands to be purchased by the trustees, all at the discretion of the trustees; and, *lastly*, the residue will be directed to be applied, as opportunity offers, in the purchase of lands and other heritages in Scotland, situated as near as may be to the entailed estate, of which lands, when bought, and of any lands to be bought by the truster himself, the trustees, after having made up titles thereto in their persons, shall execute a disposition and deed of entail in favour of the heirs pointed out by the entail already executed by the truster, and under conditions similar to those of that entail. The trust-deed should direct the new entail to be so framed as to bind the institute as well as the heirs of entail, and to be recorded in the Register of Entails and Books of Session, and completed by charter and sasine or registration, all at the expense of the trust. Provision should also be made for obtaining a discharge and exoneration from the heir in whose favour the trustees denude; and it may be well to provide also that the free rents and proceeds of the estate, until entailed, shall belong to the heir or heirs who, in their order, would have had right to the rents of the lands if an entail had been executed.

When there is no existing entail, the only difference in the form of the trust-deed will be, that it will contain no narrative of an entail; and, in place of saying that the trustees' entail is to be conform to an existing deed, it will prescribe the form of the entail to be executed by them, pointing out the heirs to be called, and the conditions to be imposed.

The same rules of strict interpretation are not acted on in construing CONSTRUCTION OF DIRECTIONS. a testator's directions to make an entail as in construing an entail when made by a testator. Thus, when the testator directed his trustees to make an entail containing prohibition to sell or burden, and all other conditions and clauses necessary for a strict entail, but omitted to specify the prohibition to alter the order of succession,—it was held that the trustees were nevertheless bound to make the entail with that as well as the other prohibitions; because otherwise it would not be a strict entail.¹ In another case, the truster, who possessed an entailed estate, conveyed fee-simple lands to trustees, with instructions to entail the same under all the conditions contained in the existing entail, 'in so far as the same may be applicable, and so as to form a valid and effectual entail, according to the law of Scotland.' After the truster's death, the entail of the original estate was found defective, and that estate was sold; but the above clause was held to import an order to insert in the new entail, to be made by the trustees, such clauses, in addition to those contained in the defective entail, as should make the trustees' entail valid and effectual.² But if the trust-deed specifies the

¹ Stirling, 30th Nov. 1838, 1 D. 130.

affirmed 14th June 1855, 2 Macq. App.

² Graham, 15th March 1852, 15 D. 558; 295.

conditions, and gives no general order or discretionary power to the trustees, the Court will not allow of any limitation excepting what is expressly appointed.¹ Nor will they allow trustees to call heirs whatsoever, in addition to the heirs-substitute pointed out by the testator, if he has given no order to call heirs whatsoever.²

I have mentioned that heritable securities cannot be made the subject of an entail; and the order to invest a sum of money for behoof of a series of heirs-substitute is incompetent at Common Law. Notwithstanding such order, the money belongs in fee-simple to the first of these heirs.³

By the Entail Amendment Act of 1848, sect. 27, it is provided that when money or other property has been invested in trust for the purpose of purchasing land to be entailed, but the direction has not been carried into effect, it shall be lawful for the party who would have been heir in possession, if the lands had been bought and entailed, to obtain payment of the money, or a conveyance of the land in fee-simple, in like manner as he could have acquired the lands if they had been entailed, and with such consents, if any, as would have been required to the acquisition of the land if entailed. The procedure and requisites in this case being exactly similar to those in the case of the disentail, it is unnecessary to specify the particulars. But it is to be observed that, for the purposes of the Act of 1848, the date at which the Act of Parliament, deed, or writing (placing such money or other property under trust, or directing such land to be entailed) first came into operation, shall be held to be the date at which the land should have been entailed in terms of the trust, and shall also be held to be the date of any entail to be made thereafter in execution of the trust, whatever be the actual date of such entail. The consents, therefore, and other proceedings applicable to the disposal of the trust-money or other property, in the case here referred to, will be as in the case of old or new entails, according to the date at which the Act of Parliament, deed, or writing, first came into operation.⁴

When the warrant of the Court is obtained, the trustees who hold the money or land will make payment, and grant an assignation or conveyance, as the case may require; and the assignation or conveyance will be constructed exactly in the way suited to divest the trustees, and invest the party to whom it is granted, according to the nature of the subject and state of the trustees' title. A form of the conveyance of land will be found in the Style Book.⁵ The destination in that form is simply to the grantee, without mention of heirs of any kind. This is in strict conformity with the words of the Act, which authorize the 'conveyance to him' of the land in fee-simple. I apprehend that, under such con-

¹ *Cuming's Trustees*, 10th July 1832, 10 Sh. 804.

² *Campbell's Trustees*, 12th May 1838, 16 Sh. 1004.

³ *Duthie*, 25th Feb. 1841, 3 D. 616.

⁴ Act of 1848, s. 28.

⁵ *Juridical Styles*, i. 252.

veyance, the land is destined to the grantee and his heirs and assignees whatsoever. Certainly it is at his free disposal; but as the disentail of entailed lands does not, of itself, operate any change of destination, it may be advisable, in cases of the conveyance of trust-land in fee-simple, that the party should execute a disposition and assignation in favour of himself and his heirs and assignees, or of the heirs whom he wishes to favour. This may be a very short deed, without any special narrative, and referring to the conveyance by the trustees for the description of the lands, which deed, with its executive clauses, it will specially assign.¹

We have seen that, by sect. 43 of the Act of 1848, when lands are held under an imperfect entail, the heir in possession is entitled to deal with them at his pleasure; and, by the same section, when money is held in trust for investment in lands to be entailed, or lands are so held with instructions to make an entail, which entail would be imperfect, if executed, the party who would be heir under such entail is entitled to have the money paid over, or the land conveyed to him in fee-simple. Here also it may be well to execute a deed destining the lands (when there are such) to heirs or assignees, or whatever parties it may be designed to favour.

When lands are to be entailed independently of any direction or obligation contained in a trust-deed which came into operation before 1st August 1848, the deed of entail will be a new entail, and will contain express consent to registration in the Register of Entails in place of the express irritant and resolute clauses. But, when there is a direction or obligation to entail contained in a trust-deed which came into operation before 1st August 1848, the deed of entail will be an old entail, though actually dated after the above date, and it ought to contain the express irritant and resolute clauses. The express consent to registration in the Register of Entails can be added, so as to make the deed effectual either as a new or old entail.

I shall now notice, as briefly as possible, the exceptions from the prohibitions affecting heirs of entail usually or frequently met with in deeds of entail, or created by Statute, and which, more or less, reach the case of lands or other property held in trust with a view to the execution of entails.

EXCEPTIONS
FROM PROHIBITIONS.

Exceptions of considerable variety occur in old entails, having reference to granting provisions to wives, husbands, and children; sales of lands for payment of entailer's debts; making exchanges of land in the entail for other lands; and granting feu-rights or building-leases.

Having already noticed the powers to grant provisions to wives and husbands and children, in considering the marriage-contract,² a very few further observations as to them will suffice here. In the first place,

¹ The form of a deed of consent, applicable to the conveyance by trustees to the heir of entail in fee-simple, will be found in the Juridical Styles, i. 259.

² See *ante*, Br. iv. Tit. ii. chap. 1.

The earliest Act on this subject,¹ commonly called the Montgomery Act, is applicable to all old entails, but only to such new entails as expressly declare it to be so. It stands in that respect on the same footing with the Aberdeen Act regarding provisions to wives, husbands, and younger children. Under the Montgomery Act, after a short and simple process before the Sheriff of the county, excambions are authorized of any part of the entailed estate not exceeding 30 acres old Scotch measure (equal to about $37\frac{1}{2}$ imperial acres) of arable land, and 100 Scots acres (equal to 125 imperial acres) of land incapable of cultivation by the plough, for an equivalent in lands contiguous to the entailed estate; the value to be adjusted by the Sheriff upon the report of valuers upon oath. The contract must be recorded in the Sheriff-Court Books within three months after execution; and being so recorded it becomes effectual, and the lands given in exchange to the entailed estate are declared to be a part thereof, and to be subject to all the fetters in the same way as if they had been originally a part of the estate. We have one case in which, by separate transactions with the same individual, a larger quantity of land was exchanged than the quantities specified in the Act.² Mr. Duff says that contracts of excambion under this Act ought to contain all the conditions of the entail;³ but in practice they do not, and I am not aware that they have ever been objected to on that account.

The power of excambion has been greatly enlarged by several subsequent Statutes. The Act 6 & 7 Will. IV. c. 42, gives power to heirs under completed entails, and who are infert, to excamb a portion not exceeding one-fourth of the estate for an equivalent in lands or other heritages;—the mansion-house, garden, and some other adjuncts not to be affected. Two estates, held under different entails, but descendible to the same series of heirs, are to be regarded as one estate in reference to this Act. The patronage of a church may now be included in an excambion, and given away from the entailed estate.⁴ Sundry notices of intended excambions, appointed by the last-mentioned Act to be given to heirs of entail, are dispensed with by the Entail Amendment Act, sects. 36 and 37, which provides also that notices of excambions shall be given only to those heirs to whom notice would have to be given of any intended disentail. And further, by 4 & 5 Vict. cap. 24, it is declared unnecessary to insert in the contracts of excambion made under the authority of the Act of Will. IV. the destination or conditions of entail, provided these be referred to as contained in the deed of entail, and that such deed be described by its date and date of recording; and by this Act (of Victoria) the keeper of the register is bound to record the contracts of excambion in the Register of Entails without an express warrant.

By the 5th section of the Entail Amendment Act, the heir in possession may, with the same consents as in a disentail, and under the authority of the Court of Session, excamb the whole estate; and the heir

¹ 10 Geo. III. c. 51.

² *M'Kechie*, 11th July 1821, 1 Sh. 116.

³ *Duff's Treatise on Entails*, p. 74.

⁴ *Kinnoull*, 16th July 1840, 2 D. 1458.

next in succession need not be of full age; he may be a minor, in which case he will be represented by a tutor or curator *ad litem*. And, by the Act of 1853,¹ the destination and conditions of entail need not be inserted in the contract of excambion executed under the Act of 1848, provided they be referred to as set forth in the original tailzie, and that tailzie is recorded.

But in proceeding under the Act of 1848, even upon consents, the Court hold themselves bound to see that a fair equivalent is given to the entailed estate for the lands taken from it. They hold that the term 'excambion' implies this; and apparently the value of growing timber, houses, and minerals, situated on the lands to be added to the entail, will not be taken into account as part of the consideration for the lands to be disentailed by the excambion; because these are all perishable subjects, and not proper equivalents for land.²

I now notice the Acts containing power to grant feus and long leases. The Act 3 & 4 Vict. cap. 48, gives power to heirs of entail to grant or dispoine in feu, or to lease, portions of land as the sites of places of public Christian worship, or for schools, burying-grounds, and playgrounds, and for dwelling-houses and gardens for the ministers and schoolmasters. The feu-duty may or may not be equal to the value of the ground; but grassums and fines are excluded. The extent for a place of worship is not to exceed a quarter of an acre; for a burying-ground, one acre; dwelling-house, one-eighth of an acre; schoolhouse and playground, one acre; and garden, half an acre. The grant proceeds on application to the Sheriff of the county for power; and the Sheriff can decide on it with consent of the next heir, or without his consent, on notice in terms of the Act.

POWER TO
GRANT FEUS
AND LONG
LEASES.

The Act of 1848 authorizes the feuing or leasing, in like manner as the disentail, of the whole or any part of the estate; and, by sect. 24, authorizes the heir in possession to grant feus or long leases, under the authority of the Court, of any part of the estate (excepting the mansion-house with its offices and policies), for the highest feu-duty or rent that can be got; such feus or long leases not exceeding one-eighth part in value of the estate for the time, and no grassum or fine being taken. The powers here conferred have been extended by the Act of 1853, sect. 6, to this effect, that power can now be obtained, under an original petition, to grant feus or long leases in a general form, to be approved of by the Court, who will fix minimum rates of feu-duty or rent to be obtained; and the form of deed, and rate of feu-duty or rent, can be altered by the Court from time to time, on application for that purpose, but without a new petition.

When an heir of entail was, by a clause in his entail, specially empowered to grant small feus of any part of the estate, not encroaching on the manor-place, etc.,—no feu exceeding one-eighth part of an acre,—it was found that he could competently convey to the same individual,

¹ 16 & 17 Vict. c. 94, s. 11.

² Hamilton, 12th June 1858, 20 D. 1134.

directly or indirectly, more feus than one, but not in slump,—only as separate feus, none of which exceeded the limited extent.¹

POWER OF
LEASING.

The Montgomery Act (applicable to new entails only if expressly declared therein to be so) gives power to grant improving leases and building leases; the former for fourteen years and a lifetime; or for the lives of two persons in being at the date of the lease, and the life of the survivor; or for a period not exceeding thirty-one years. The building-leases may be for any period not exceeding ninety-nine years; but no person is to hold more than five acres, directly or indirectly; and the Act declares, and the lease is to declare, that the lease shall be void if within ten years from its date one dwelling-house, not under the value of £10 for every half-acre of ground leased, shall not be built; the dwelling-house or houses to be kept in good repair; and the lease is declared void whenever there shall be a less number kept in repair.

The mansion-house and its adjuncts are excepted from the powers of this Act; and no lease is to be granted for building villages or houses within three hundred yards of the manor-place; nor is the rent to be less than the last rent; no grassum is to be paid; nor is the lease to be dated upwards of one year before the termination of an existing lease granted for a time certain.

The clause prohibiting a grassum or other benefit extends to every benefit of a kind different from the rent.² But the benefit must be clear. Thus, in a question with a party not the former tenant, the term 'last lease' is strictly interpreted; and it is irrelevant to allege that a prior lease, of which that before the Court was a renewal, had been granted partly in consideration of a grassum.³

The Act 6 & 7 Will. IV. cap. 42, has relation to leases of a proper agricultural kind, and of mines and minerals. There are some old entails which prohibit the granting of ordinary agricultural leases for more than fourteen years, or provide that, in certain cases, leases shall be let by public roup only; and the Act gives power to let, in any case, by public roup or private bargain, for any term not exceeding twenty-one years, for the fair rent at the time, and to grant tacks of mines and minerals for any period not exceeding thirty-one years. But no grassum is to be taken; nor are the home-farm, mansion-house, and adjuncts to be let for more than the lessor's lifetime. This Act now applies to unrecorded as well as to recorded entails.⁴

POWER TO
BURDEN.

We have now to consider the powers given by the Acts to burden entailed estates with debts or incumbrances.

IMPROVEMENTS.

The Montgomery Act authorizes heirs of entail, who expend money in improvements of the estate by enclosing, planting, draining, and erecting fences, houses, and offices, or outbuildings for the same, and in building or repairing or adding to a mansion-house or offices, to

¹ Abercorn, 26th Jan. 1816, F. C.

² Mure, 22d Dec. 1808, F. C.

³ Buccleuch, 24th Nov. 1827, 6 Sh. 128.

⁴ 1 & 2 Vict. c. 70.

become creditors of the succeeding heirs of entail for three-fourths of their expenditure; the amount of the claim not exceeding in the case of ordinary improvements four years' free rent, and in the case of the mansion-house two years' free rent, of the estate. The Act prescribes a great variety of formalities which have to be observed in order to sanction the claim, which is never to be the ground of an adjudication against the fee of the estate, and is to be extinguished when it falls to the heir in possession. It is, moreover, inapplicable to estates held under unrecorded entails.¹ A case, raising the question whether the Act was applicable to an entail with imperfect irritant and resolute clauses, and the estate contained in which had been sold by the heir on whom the claim was made, was lately before the Court, but has been compromised; and that point is not settled.

The improvements must be of a permanent character,—not merely such as are required for keeping up and leaving a subject in as good condition as when the heir succeeded.² A family monument or mausoleum, in the case of a large estate, is within the Statute.³ And, by the Act of 1848, private roads are declared to be on the footing of improvements under the Montgomery Act. An embankment to secure an outfall for drainage is an accessory of draining, and so chargeable;⁴ also a bridge to connect the mansion-house with the garden; a pond and loch connected with draining;⁵ introducing water into the mansion-house, erecting a porter's lodge, and gates, filling up an exhausted quarry, and executing works to prevent the recurrence of a land-slip;⁶ expenditure on private roads;⁷ and the erection of a dog-kennel.⁸

On the other hand, the cost of the following items, as not being of the statutory character, has been disallowed, viz., an engine to work minerals, that being a facility to exhaust the substance of the estate;⁹ furnishing a mill with mill-stones, these being moveable and perishable;¹⁰ a tile-work, claimed as part of the expense of draining;¹¹ trenching previous to draining;¹² building a thirlage-mill;¹³ shooting-lodges;¹⁴ repairs on an inn, a new smithy, shed for game, dog's couch, repairing house at a saw-mill, a smith's house, embankments, the road to a tile-work, and erecting a tile-work;¹⁵ building a racket-court;¹⁶ and gamekeepers' houses on a distant part of a deer-forest.¹⁷ In a case

¹ Paget, 24th Feb. 1837, 15 Sh. 667; Lord M'Donald, 26th May 1840, 2 D. 889.

² Fraser, 16th December 1841, 4 D. 266.

³ Fraser, 27th Feb. 1840, 2 D. 684.

⁴ Baillie, 17th July 1850, 13 D. 42.

⁵ See Duff on Entails, p. 66, and Menzies, p. 749; Porterfield, 24th Feb. 1853, 15 D. 428.

⁶ Muirhead, 10th March 1853, 15 D. 517.

⁷ Ramsay, 21st November 1854, 17 D. 74.

⁸ Marquis of Huntly, 12th June 1857, 19 D. 818.

VOL. II.

⁹ Earl of Glasgow, 27th Nov. 1850, 13 D. 187.

¹⁰ Muirhead's case.

¹¹ Marquis of Ailsa, 20th Jan. 1853, 15 D. 308.

¹² Ramsay's case.

¹³ Fleeming, 17th Feb. 1855, 17 D. 451.

¹⁴ Duke of Athole, 3d July 1855, 17 D. 1015.

¹⁵ Duke of Athole, 4th March 1856, 18 D. 730.

¹⁶ Earl of Eglinton, 31st Jan. 1857, 19 D. 346.

¹⁷ Marquis of Huntly's case.

where there were two estates at a great distance from each other, it was found competent to claim for the erection of a mansion-house on one of them, though there was already a house on the other; and it was held that the claim was to be calculated with reference to the rental of both;¹ and though there are two entails, granted by different parties, yet, if the estates are interspersed, and the destinations and conditions in both deeds are the same, the rental of both is to be taken into account in fixing the amount of the claim for building the mansion-house on one of them.²

NOTICE TO
NEXT HEIR.

Before commencing the improvements, the Montgomery Act requires that notice thereof be given, by the heir about to expend, to the next heir of entail of full age and resident in Great Britain; and that accounts of the expenditure shall be signed and recorded in the Sheriff-Court Books, along with the vouchers, annually within three months after each term of Martinmas. The notice must be accurate, and must be given three months before the expenditure is begun.³ Intimation to the wrong party, though *bond fide* believed to be the right one, was rejected.⁴ But a notice to the right party, that the proprietor in possession intended to enclose, plant, and drain certain lands for their improvement, was found sufficient.⁵ A notice duly made, under which improvements proceed uninterruptedly, although for a series of years, need not be renewed; nor does a notice fall by the death of the party to whom it is given, if the improvements, notwithstanding an interval of about two years, have not been abandoned; but the notice must be timeously followed up; and thus a notice given several years prior to the execution of the improvements was held to have expired.⁶

ACCOUNT OF
EXPENDITURE.

The account lodged with the Sheriff-clerk must state the particulars, and not merely the amount, of the expenditure;⁷ but it has been held sufficient specification to give the names of the tradesmen, and the general description of the work, such as mason or wright work.⁸ The account must be subscribed prior to its registration,⁹ by the party, or his factor or commissioner. The subscription of his law-agent, not being the disburser, is not sufficient.¹⁰ The account must be recorded strictly within the statutory period, and, if a week too late, the delay will be fatal to the claim.¹¹ It must be lodged within the statutory period annually during the progress of the work, and not merely after its completion,

¹ Stirling, *supra* (1814).

² M'Donald, 15th Dec. 1835, 14 Sh. 150.

³ Elliot, 22d Jan. 1793, M. 15,622.

⁴ Finlayson, 12th Dec. 1821, 1 Sh. 208; Thomson, 11th Dec. 1824, 3 Sh. 385.

⁵ Campbell, 15th May 1822, 1 Sh. 409. See also Elliot's case.

⁶ Fraser, 2d December 1835, 14 Sh. 89; Williamson, 18th Feb. 1841, 3 D. 570; Torrance, 1st December 1820, F. C.; as reversed 26th May 1826, 2 Wil. & Sh. App. 429.

⁷ Torrance's case.

⁸ Earl of Kintore's Executors, 30th June 1847, 9 D. 1394.

⁹ Campbell's case.

¹⁰ Fraser, 2d Dec. 1835, 14 Sh. 89; Fraser, 27th Feb. 1840, 2 D. 684. In the case of the Breadalbane Trustees, 6th June 1866, 38 Jurist, 414, an entail proprietor having died three days before Martinmas, the subscription of his executors to the account of sums expended by him during the preceding year was found sufficient.

¹¹ Campbell's case.

or when the expense comes actually to be paid.¹ Where the principal account of expenditure has been lost, an extract of the account and vouchers from the Sheriff-Court Books is not evidence in an action in the Court of Session; and a proving of the tenor is necessary.² The tradesmen's receipts are the proper evidence of the amount expended; and those of intermediate persons, such as tenants employed or authorized to conduct the operations, have been rejected.³ But an affidavit by the workmen, employed to superintend the manufacture and application of materials, was sustained as the proper evidence of the quantity and value of wood belonging to the improver, and used in the work;⁴ and days' wages paid to labourers were allowed without vouchers.⁵ The vouchers, in like manner with the accounts, must be recorded strictly within the statutory period.⁶

The action competent to the improver is a proper action of declarator for ascertaining the amount due; and the decree, though in absence, if regular in itself, cannot be opened up after the statutory limitation has expired, unless on the ground of falsehood or fraud.⁷

When the heir-disburser lays out such a sum as exhausts his right to charge succeeding heirs, and assigns his claim, the assignee is preferable, as against the succeeding heirs of entail, to the assignee of subsequent outlay, which can constitute no claim,—the powers of the heir-disburser having been exhausted by the outlay first assigned. The second assignation in such case carries nothing.⁸

The provisions of the Montgomery Act were so difficult of observance as to render its powers comparatively unavailing; and, by the Entail Amendment Act of 1848, power was given to heirs of entail who had executed improvements prior to the passing of the latter Act, under the authority of the Court of Session, to burden the rents of the estate with an annual rent charge, not exceeding legal interest (then five per cent.) on three-fourths of the amount expended and ascertained by decree under the Montgomery Act, payable during the life of the improver, and of a sum not exceeding £7, 2s. per cent. on such three-fourth parts for twenty-five years after his death.

As regards future improvements, the same powers are given when these are constituted by decree, except that the payment of the £7, 2s. yearly is to go on for twenty-five years from the date of the decree. And the executor or assignee of the heir who has obtained decree on account of improvements, prior to the passing of the Entail Amendment Act, is entitled, but not bound, to require bond of annual rent from

¹ Marquis of Abercorn, 11th July 1840, 2 D. 1382.

² Fraser, 27th February 1840, 2 D. 684.

³ Stirling, 14th Dec. 1814, F. C.; Torrance's case; Williamson, 18th Feb. 1841, 3 D. 570.

⁴ Fraser, *supra* (1840).

⁵ Marquis of Huntly, 12th June 1857, 19 D. 818.

⁶ Campbell, *supra* (1822).

⁷ Lord M'Donald, 7th Feb. 1831, 9 Sh. 460; Lindsay, 30th May 1834, 12 Sh. 657; M'Pherson, 14th May 1839, 1 D. 718.

⁸ Cochrane, 30th June 1836, 14 Sh. 1040.

the succeeding heir of entail for such amount as his author could have granted.

It often happened that expenditure in improvements was irrecoverable under the Montgomery Act because of non-observance of the statutory forms; and the Act of 1848 places parties, as to such expenditure when duly instructed and vouched, on the same footing as to the bond of annual rent as if the forms of the Act had been observed. But in that case the executors or assignees appear to have no right or claim to require a bond of annual rent after the improver's death; and the benefit of the enactment as to informal improvements appears to be lost in case it is not made available during the improver's lifetime.

In all cases where bonds of annual rent can be granted, it is optional to the parties respectively to grant or require bond and disposition in security for capital sums; the amount thereof being two-thirds of the sum on which the annual rent would be calculated,—that is, two-thirds of three-fourths (exactly one-half) of the amount of expenditure. Such bond and disposition in security may be in like form as other bonds under the Statute; as to all of which the heir in possession for the time is to keep down the interests during his possession; and in the cases of bonds and dispositions in security on account of improvements, and bonds of provision to children charged on the fee of the estate, the creditors' claim on the estate is limited to the principal sum and two years' interest, and corresponding penalties.¹ The Act of 1848² authorizes the heir in possession, though not infest, to perform any act permitted by the Statute to be done. But that clause does not operate the suspension of the ordinary rules of law as to the necessity for infestment (or now equivalent registration); nor does it render valid any bond and disposition in security, or other deed, the granter of which requires infestment or registration.

The powers of that Act in reference to charging provisions to children on entailed estates have already been referred to. And the Act authorizes the charging of estates with debt, without limit as to amount or description, with or without consents, as in the case of disentaills.

ROADS. The only other power of burdening which it seems necessary to notice, is that conferred by the Act 4 Geo. IV. cap. 49, which enables the heir in possession to burden the estate to the extent of a year's rent for the expense of making public roads.

A few incidental points connected with the subject of entails still require attention, and some of these are very important.

The Act of 1848 is not to be defeated by indirect methods. The endurance of trust-rights is limited, so that a beneficiary of full age, born after the date of the deed, shall be deemed the fee-simple proprietor of the trust-estate; and may, on application to the Court, obtain an act

¹ Act of 1848, s. 22.

² *Ibid.* s. 42.

and decree to that effect; which, when recorded in the appropriate register of sasines, will operate as a disposition and infestment in favour of such party and his heirs and assignees. Liferent rights, in like manner, are to be granted only to parties in life at the date of the grant; and any party born after that period, on whom a liferent only is conferred, shall be deemed, when of full age, the fee-simple proprietor, as in the case of a trust,—the rights of superior and third parties being reserved. Leases, whether direct or to trustees, are declared ineffectual to limit the right of a party of full age who was born after the date of the deed, or to restrict or abridge his possession or enjoyment of the subject in favour of any future heir,—the right of the proprietor to enforce *bond fide* stipulations in his favour being saved.

And, by sect. 41, the Act 39 and 40 George III. cap. 98, commonly called the Thelusson Act, is extended to Scotland as respects heritable property. It was, from the first, applicable to moveable property in Scotland. That Act annuls every direction by will or other deed to accumulate annual proceeds of property for a longer time than twenty-one years after the testator's death, or during the minority or respective minorities of a person or persons living at the time of the testator's death. The form in which the Thelusson Act is made applicable to heritable property in Scotland is by the repeal of an exception contained in the Act as to such property. But the repeal is held not to have a retrospective effect; and deeds which came into operation before the passing of the Act of 1848 are not affected by the repeal.¹

I have also to mention that the destination to the heirs of entail can be either incorporated in the principal deed or contained in a separate deed of nomination of heirs. When a separate deed is to be employed, it is usual to make the destination in the principal deed in favour of one or more branches, and then to such other heirs as shall be named by the entailer in any separate relative deed, executed or to be executed by him. In such cases the deed of nomination, when duly executed, is of equal effect as if its contents were incorporated in the principal entail; and though it is not noticed or referred to in the feudalizing titles, and the estate is possessed for forty years on such titles, prescription cannot be pleaded against it. Prescription does not begin to run until there is adverse possession.²

And, if the entail reserves power to alter the destination, or is granted subject to a general power of alteration, or is undelivered and so subject to such power, a deed of alteration duly executed will receive effect, and the heirs thereby called will succeed in their order, in preference to heirs called by the principal entail, and whose right is postponed by the deed of alteration. But the deed of alteration ought to be noticed and embodied in the feudalizing titles; as the defence against

¹ Keith's Trustees, 17th July 1857, 19 D. 1040.

² Porterfield, 2d July 1817; remitted

by the House of Lords, 24th May 1826, 2 Wil. & Sh. App. 369, and finally decided 13th Nov. 1829, 8 Sh. 16.

prescription in such a case is by no means so clear as in that of the destination to heirs to be named.¹

It is usual, and very desirable, to have the contents of such deeds embodied in the investitures ; and by the Titles Act of 1858, sect. 36, they may be recorded in the Register of Sasines along with the principal deed to which they bear reference, as being, for the purposes of that Act, parts of the principal deed. In such cases the warrant of registration on the principal deed ought to refer to the deed of nomination, and the latter deed should have a relative docquet for the sake of identification. The deed of nomination should also be recorded in the Register of Entails along with the deed of entail.

In framing deeds of entail, it is of great importance that the same words be uniformly employed to express the same thing. The heirs should not at times be called 'heirs of taillie,' at times 'heirs of taillie and provision,' at times 'heirs substitutes and successors,' and at other times 'heirs and successors;' nor should the estate which is conveyed be referred to as at one time 'the lands and others,' at another time 'the lands barony and others,' or again, 'the lands and estate.' It is proper to select judiciously such expression as appears most suitable, and then carefully to adhere to it throughout.

A similar remark might be made as to trust-deeds ; and, in general, as to the framing of all deeds in which the same thing has to be over and over again referred to. The reference should always be in the same terms, showing clearly that one and the same thing is meant throughout.

¹ Porterfield's case.

TITLE V.

TRANSMISSION OF ESTATE, HERITABLE OR MOVEABLE, FROM THE DEAD TO THE LIVING.

CHAPTER I

WE are now to consider the transmission of heritable subjects to heirs-at-law, or heirs of provision or investiture; and I will in the first place explain the terms descriptive of the different classes of heirs. The word 'heirs' is a flexible term, with a general signification, applicable to all those successors of persons deceased who have right to the subject of their succession by law upon the death of their predecessor. It embraces as well the successors in allodial or other rights, not requiring any writing for instructing transfer from the dead to the living, as those in rights requiring the judicial process of service for that purpose; and that whether the successors have right in virtue of the destination pointed out generally by law, or specially by the disposition or other deed of parties. We have seen that the term, when used in deeds affecting moveable rights, means the heirs in moveables,—that is, the next-of-kin or executors.¹ Where the simple term 'heirs' is used in deeds applicable to heritable estate, it may mean the heir of line, heir of conquest, or heir of provision, according to circumstances;² and, when there is a destination generally to the disponent's 'heirs' in a deed embracing both heritable and moveable subjects, the term is held to mean heirs in heritage as to the heritable subjects, and heirs in moveables as to the moveable subjects.³

1. The heir of line is the heir who succeeds by the destination of law, according to the line or course of succession pointed out by the law, to an unlimited fee, or 'fee-simple' as it is technically called. This term is nearly synonymous with the term 'heir-at-law,' 'heir-general,' 'heir whomsoever' or 'whatsoever.' But, although the same individual may

¹ See on this point Macdoul, Feb. 1727, M. 12,844; and Irvine, 15th July 1851, 13 D. 1367.

² See Bowie, 23d Feb. 1809, F. C.

³ Blair, 16th November 1849, 12 D. 97.

be heir of line and heir-male, and may take as heir what his predecessor acquired both by succession and by purchase or conquest, the term 'heir of line' is never used to denote the heir-male, or the heir of conquest.

HEIR OF
CONQUEST.

2. The heir of conquest is the heir who, in certain circumstances, takes lands which may be the subject of infeftment, acquired or conquest by his predecessor otherwise than by proper succession. Such lands are called '*feuda nova*,' in contradistinction to lands devolving by proper succession, which are called '*feuda antiqua*.' It is only, however, in collateral succession that a distinction obtains between conquest and proper heritage. The immediate elder brother of the deceased is his heir of conquest: the immediate younger brother his heir of line. And again, when there is no elder brother, or the descendant of an elder brother, the immediate younger brother, or heir of his body, is the heir both in heritage and conquest; and when there is no younger brother the immediate elder brother, or heir of his body, is heir both in heritage and conquest.¹ The rules applicable to the succession of brothers to brothers hold equally in the succession of brothers to sisters. Thus, where a woman died, leaving a nephew descended of her deceased immediate elder brother, the nephew was preferred to the eldest brother as heir of conquest to his aunt.² In Grant's case it appears that the son of the immediate elder brother was about to serve himself heir 'both of line and conquest' to his uncle. But it may be questioned if there is any place for an heir of conquest unless there is a separate heir of line.³

There are, however, some exceptions to the general rule of succession in conquest, founded no doubt on the presumed intention of the parties. Thus, where the proprietor of lands which were heritage, or *feuda antiqua*, purchased the teinds of his lands, the teinds were held to devolve on the heir of line in the lands, though heritage, and not on the heir of conquest.⁴ And, in order that lands may devolve on the heirs of conquest, it is necessary that the deceased shall himself have actually had right to the lands. When the lands are destined to A. B., and his heirs whatsoever, and A. B. dies without actually acquiring right under the conveyance, the lands are not conquest in his person. He did not acquire them. The destination to him and his heirs whatsoever accordingly carries the lands not to his heirs of conquest, but to his heirs of line; not, however, as heirs to him in the technical sense of these terms, but as disponees under the deed of conveyance.⁵

HEIRS-
PORTIONERS.

3. Heirs-portioners are females in the same degree of propinquity to the deceased, or the descendants of such females; for example, daughters, sisters, aunts, or the heirs of their bodies. Such heirs suc-

¹ Grant, 29th Nov. 1757, M. 14,874.

² Cuninghame, 7th December 1770, M. 14,875. See also Robertson, 7th July 1675, M. 5605.

³ Stair, iii. 5. 10.

⁴ Greenock, 17th December 1736, M. 14,935; Hamilton, 8th January 1740, M. 14,935.

⁵ Boyd, 28th June 1774, M. 3070; Robison, 3d June 1859, 21 D. 905.

ceed to equal shares or portions *pro indiviso*; the heirs of the body of a deceased daughter, or sister, or aunt, taking their parent's share. Nieces descended of a brother are held as representing him, and take what would have fallen to him if he had survived: nieces by a sister take what would have fallen to such sister if she had survived. Conquest has no place in the succession of heirs-portioners; at least on the death of a party who leaves no male heir, and to whom heirs-portioners succeed, the heirs-portioners take heritage and conquest without distinction and in equal shares.¹ But if the immediate elder brother, who, had he survived, would have been the heir of conquest, shall have left two or more daughters and no son, the daughters will succeed as heirs-portioners of conquest to their father's immediate younger brother.

4. Heir-male is an heir of provision by destination of party, and HEIR-MALE. means the nearest male heir who can claim exclusively through males. Heirs-male may be either of line or of conquest. Thus, if the destination of lands conquest by A. be to A. and his heirs-male, and if A. die without issue male, his immediate elder brother would take the lands as heir-male of conquest in preference to the immediate younger brother, who is heir-male of line.² But if the subject be a tack (which does not admit of infeftment), it would fall to the heir-male of line;² and if the destination be to the heirs-male of line the immediate younger brother would probably take, even in the case of lands.³ In Sinclair's case, however, the point was not actually tried; the younger brother, who, it was assumed in argument, would have taken as heir-male of line, having died without issue, and the succession having devolved on the elder brother. The question tried was, whether any one could hold the character of heir-male of line, and whether these terms were not inconsistent with or contradictory of each other. It was decided that there could be an heir-male of line.

But in this, as in all cases of special destination, the intention of the parties is to be looked to; and when, from the context, it appeared to be intended that the term 'heir-male' should apply to the heirs-male of the body, and not to heirs-male general, the destination to heirs-male has been held to call heirs-male of the body only.⁴ As a general rule, however, the Court will hold parties who employ technical terms as intending these to have the meaning which the law has bestowed on them, and will construe terms accordingly without regard to probable intention or to extraneous matter. Lord Pitmilley states the rule on this point thus:—'I find here clear technical language, and I cannot think we have anything to enable us to get the better of it.'⁵ Thus, where the

¹ Carse, 5th Feb. 1717, M. 14,873; Adam, Jan. 1727, M. 14,874. See also Craig, Book ii. Dieg. 15.

² Dunbar, 24th June 1625, M. 5605.

³ Sinclair, 24th June 1766, M. 14,944; affirmed 6th April 1767.

⁴ Ker (one of the Roxburghe cases), 23d June 1807, M. App. Tailzie, No. 13; affirmed 8th June 1811, 5 Paton's App. 320. See also Braid, 20th January 1860, 22 D. 433.

⁵ Dykes, 9th Feb. 1811, F. C.

conveyance was by a father to his son and heirs-male and assignees whomsoever; whom failing, to the heirs-female of the father's body; the heir-male, though not of the body, of the son (who predeceased the father), was preferred to the father's daughters.¹ Again, in a destination to A. and B., *nominatim et seriatim*, and the heirs-male of their bodies; whom failing, to C. and his lawful heirs-male; whom failing, to the heirs-female of D.;—the term 'lawful heirs-male' being unambiguous, and not limited to the issue male or heirs-male of the body, and there being nothing in the rest of the deed to overrule the general meaning of the term, the heir-male general of C. was preferred to D.'s heirs-female.² And where the destination was to the eldest sons of the testator's three daughters successively in order (that is, the eldest son of the first daughter; whom failing, the eldest son of the second daughter; whom failing, the eldest son of the third daughter), and the heirs-male of their bodies respectively; and then to the second sons of said daughters successively, and the heirs-male of their bodies; whom failing, to the heirs-male of the daughters successively (on this occasion not to the heirs-male of the body of the daughters, nor to their third sons successively); it was held that this last destination carried the estate to the nearest heir-male of the eldest daughter. The contention was that, there being a series of destinations to eldest sons, and a like series to second sons, successively, the destination in favour of heirs-male ought to introduce a series of third sons of the daughters successively. But the Court, without hesitation, gave the term its technical meaning.³ In the same case, as well as in the Roxburghe case, it was decided that the term 'eldest son,' 'second son,' and so forth, means the eldest or second son, etc., in existence, or represented by descendants entitled to succeed, as at the time the succession opens; so that one born a third son would succeed in the character of eldest or second son, if his elder brothers, or one of them, should die and be unrepresented before the succession opened.

**HEIR-MALE OF
THE BODY.**

5. Heir-male of the body, or heir-male of a marriage, is likewise an heir of provision by destination of party, and means the eldest son, or other nearest male heir, descended of the body of the person named, or descended of the marriage specified, and connected with the person named, or with the spouses, exclusively by males. In reference, however, to destinations to heirs-male, or heirs-male of the body, though the word 'heirs' is used in the plural number, it is not necessarily meant that the whole heirs-male, or heirs-male of the body, of the party named, shall be exhausted before other heirs can succeed. Whether or not it was so meant, would, no doubt, be a question depending on the intention of the parties; but where the destination was to A., and the heirs-male of his body, and the heirs whatsoever of the body of the said heirs-

¹ Campbell, 28th Nov. 1770, M. 14,949.

² Hay, 24th July 1788, M. 2315; affirmed 25th May 1789, 3 Paton's App. 142.

³ Shepherd, 1st Dec. 1836, 15 Sh. 173; affirmed 28th May 1838, 3 Sh. and M'L. App. 255.

male,—the daughter of the eldest son (that is, the heir whatsoever of his body) was preferred to the second son of A.¹

In such cases the executive clauses will not control, so as to contradict, the dispositive clause, which in this matter is the ruling clause. Thus, where the dispositive clause and obligation to infeft were in favour of the heirs-male of the body, and the procuratory for accomplishing the infeftment by resignation was to the heirs of the body,—the heirs-male of the body were held to be meant; the words employed in the dispositive clause being clear and unambiguous. The dispositive clause, in fact, is held to be imported into the procuratory of resignation and other executive clauses.² But, where the clauses are not positively adverse to each other, an executive clause may sometimes be held as supplying an omission in the dispositive clause. The construction in such cases depends on the presumed intention of the parties. Thus, where the dispositive clause in an entail conveyed lands to a series of heirs, and in all except two of the branches of the destination called the heirs-male of the bodies of the *nominatim* substitutes, and, in the procuratory of resignation, the heirs-male of the bodies of these, as well as the other substitutes, were called,—it was held that the procuratory supplied an omission in the dispositive clause, and that the heirs-male of the bodies of the two substitutes referred to were called to the succession.³

6. We shall now consider the case of destinations to heirs-female HEIRS FEMALE of the body. Under such destinations the heirs called are the descendants,—whether females, or males connected only or partly through females,—who would be heirs of line, or heirs-at-law, apart from special destination. For example, A. B.'s grand-daughter by his eldest son is entitled to succeed as heir-female of the body of A. B., in preference to A. B.'s immediate daughter. And the rule is the same where the destination is to 'the eldest heir-female of the body.' The great-grandson, by the eldest son and his daughter, is preferred to the grandson by the immediate daughter of the common ancestor.⁴

The term 'eldest daughter, or heir-female of the body,' or 'of a marriage,' would be construed in the same way as if the expression 'eldest heir-female' only had been used; the term 'heir-female' being held as qualifying and explaining the word 'daughter.'⁵ In Lyon's case, the Court found unanimously 'that the legal meaning of the term "heir-female," which in this tailzie is used to explain "eldest daughter," is so fixed and appropriated in our law to denote the female heir-

¹ Lockhart, 19th Jan. 1837, 15 S. 376; affirmed 15th March 1842, 1 Bell's App. 202.

² Forrester, 11th July 1826, 4 Sh. 824.

³ Sutherland, 26th Feb. 1801, M. App. voce Tailzie, No. 8.

⁴ Hope, 18th Jan. and 11th July 1738, Elchies, voce Provision to Heirs, No. 2; as

reversed, 27th March 1739; Craigie & Stewart's App. 237. This is the Bargany case; a leading authority in the law of tailzied succession, by which the point may be held as conclusively settled in the way here stated.

⁵ Lyon, 19th June 1739, 5 Br. Sup. 663.

'at-law, that nothing less than the express will of the tailzier, declared 'in so many words, can alter the signification of it.' They therefore decided in favour of the grand-daughter by a son, in preference to the immediate daughter, of the common ancestor.

But if a party destines his estate to his 'daughter,'—or 'eldest' or 'only daughter,'—even *designativé* and not *nominatim*, but without any qualifying expression, the term is not synonymous with 'heir-female.' The immediate daughter will succeed in preference to the grand-daughter by a son.¹ It is desirable, however, that when the immediate daughter is to be preferred to the grand-daughter by a son, the daughter should be named, if she is in existence. If not, words should be used showing the party's intention in her favour beyond all possibility of question.

HEIRS WHAT-
SOEVER.

7. The term 'heirs whatsoever,' or 'heirs and assignees whatsoever,' occurring in the last branch of the substitution in a tailzie, means the heir of line, in contradistinction to the heir called by the destination contained in the former settlements of the lands.² But the above term has a flexible meaning,—perhaps even more than the others we have been considering,—the intention of the party being still the rule of construction. Thus, where a party, holding a tack of teinds to himself and his heirs-male, granted a sub-tack, making the sub-rent payable to himself and his 'heirs whatsoever,' it was held that the destination of the principal tack was not innovated or altered by the sub-tack, and that the 'heirs whatsoever'—the parties who were entitled to draw the sub-rents due under the sub-tack—were to be interpreted to mean the 'heirs-male'—the parties who were in right of the principal tack.³ And where the principal titles to an estate, or an original bond, are destined to heirs-male, or to a particular series of heirs of provision, it would seem that the heir or person in possession, acquiring or holding collateral or accessory rights conceived in favour of heirs whatsoever, or to heirs and assignees whatsoever, will not readily be held as intending that the right and succession to the two subjects should separate when the heirs whatsoever happen to be different from the heirs-male or heirs of provision.⁴

The destination to 'heirs and successors whomsoever,' or the general destination to 'heirs,' may further be controlled by the context, and limited to heirs of the body. Thus, where a party disposed to his grandson, and his heirs and successors whomsoever, whom failing, without a lawful child or children existing of his body, to return to the disponent himself,—this was held equivalent to a destination to the grandson and the heirs of his body only; and accordingly, on the failure of the grandson and the heirs of his body, the succession was held to return to the disponent, in preference to the heirs-general of his grandson.⁵ A similar construction was given to the term 'heirs of the

¹ Ker, 13th Nov. 1810, F. C.; affirmed 26th Feb. 1812, 5 Paton's App. 579.

² Duke of Hamilton, 4th March 1771, M. 4358, 4369, and 5 Br. Sup. 467.

³ Hay, 16th Nov. 1698, M. 14,899.

⁴ M'Lauchlan, 12th Jan. 1757, M. 2312; Burnet, 28th June 1765, M. 14,939; affirmed 30th April 1766, 2 Paton's App. 122.

⁵ Tinnoch, 26th Nov. 1817, F. C.

longest liver,' as used in a mutual deed of settlement by two sisters 'to the longest liver in liferent, and to the heirs of the longest liver in fee.' The circumstances of the case and the argument for the above construction are very fully given in a note by Lord Moncreiff Ordinary.¹ On the general point his Lordship says, 'The intention must be found in the deed itself, and it must be clearly shown in order to control the natural force of the terms.' Again he says, 'To restrain the term "heirs" from its general meaning certainly requires a clear expression of the intention of the testator. But in a testamentary deed of this kind the intention clearly evinced must overrule everything.' Where, however, there is nothing in the context or other provisions of the deed to control or limit the terms employed in the destination, technical terms will be allowed their ordinary signification. Thus the destination in a testamentary deed, to a son and his heirs and assignees whatsoever, was held not limited to heirs of the son's body.² In Baillie's case, a destination to A. and his heirs and assignees, whom failing, to B. and his heirs and assignees, was held to call the nearest heirs of A., though not descended of his body, in preference to B. and his heirs.³

Here it may, perhaps, be worth while to point out that the right of succession under a destination to A. and the heirs of his body, and a destination to A. and his heirs and assignees, is capable of diverging even whilst heirs of the body of A. exist. Thus, suppose that A. leaves two or more sons, the eldest of whom marries, and dies leaving only one child, a daughter, and that the daughter marries, and dies leaving an only child, who also dies;—under the destination to A. and the heirs of his body, the succession to this only child would open to the second son of A., or such other descendant of A. as should for the time be the nearest heir of A.'s body; whereas, under the destination to A. and his heirs and assignees, the succession would open to the father of the only child, or to the nearest heir of the only child for the time connected by his father, to the exclusion of heirs descended of the body of A.

We have seen that, in a destination of heritable subjects to a party and his heirs, the heirs in heritage are meant. The same construction is given to the destination, in a marriage-contract, in favour of the heirs and bairns of the marriage, of lands belonging to the father at the date of the deed: the term 'heirs' in such cases is held to overrule that of 'bairns.'⁴ But if the provision in favour of the heirs or bairns of the marriage be of a sum of money, and whatever shall be conquest during the marriage, the conquest, though including heritable subjects, does not fall to the eldest son or heir, but is divisible amongst all the children.⁵ And where the destination is to the 'bairns,' without using the word

¹ Hunter, 14th Nov. 1839, 2 D. 16.

² Suttie, 19th Jan. 1809, F. C.; see also Baillie, 17th June 1766, M. 14, 941; as reversed, 26th March 1770, 2 Paton's App. 243.

³ See also Richardson, 5th July 1821, 1 Sh. 105; affirmed 8th April 1824, 2 Sh. App. 149.

⁴ Fairservice, 17th June 1789, M. 2317.

⁵ Rankin, 17th Feb. 1736, M. 14, 931.

HEIRS AND
BAIRNS.

CHILDREN OF
MARRIAGE.

'heirs,' the whole children are entitled to succeed in equal shares, even to heritable subjects.¹ The result is the same when the destination is to the children of the marriage.² Moreover, when by marriage-contract the father bound himself to lay out a specific sum of money, contributed half by himself, half by his wife, on land or other good security, and to settle the same upon himself and his wife, and longest liver of them, in conjunct fee and liferent, and the heirs to be procreated between them in fee,—the whole children of the marriage were held to be meant.³ In this case a provision of the conquest during the marriage in favour of the heirs of the marriage was held as giving an equal right to all the children. The conquest, however, appears actually to have consisted of moveable property.

EXCLUSION OF
HEIR.

In connexion with the general subject now before us, I have again to notice that, where there is a conveyance with a destination, there is a material difference between simply passing by an heir, and positively excluding him. When the heir is merely passed by, he can succeed, in case of the failure of the heirs specially called, supposing him to be the nearest heir after them. But if he is expressly excluded he cannot succeed, even on the failure of all the substitutes nominated.⁴ There must, however, be a conveyance and destination in favour of other parties. Simple exheredation, without conveyance to a third party, would be ineffectual to exclude the heir. In conclusion, I have to repeat not only that the intention of the parties is the *regula regulans*, when competently expressed in the deed, but that (consequently on that principle) every case is in a great degree a case by itself. Every deed is to be construed as a whole, and according to its own terms and circumstances. On that point the Lord Justice-Clerk Boyle says, in Dykes' case, 'The Roxburghe case was decided on sound principles of law; but it cannot in the least affect any other case not precisely 'similar in all its circumstances.'

CHAPTER II.

TRANSMISSION
TO HEIRS UPON
INTESTACY.

I NOW proceed to consider the modes in which lands are vested in heirs succeeding by the mere operation of law, or at least having no conveyance in their favour from their predecessors.

The rule *mortuus sasit vivum* came into full operation in England on the abolition of military tenures in the reign of Charles II.⁵ With us,

¹ Carnegie, 13th February 1677, M. 12,840.

² Wilson, 14th June 1811, Hume 534; Jardine, 22d Jan. 1850, 12 D. 504.

³ Allardyce, 12th Feb. 1721, Robertson's App. 399.

⁴ Ayton, 5th Feb. 1742, M. 14,935.

⁵ Duff, p. 441.

in the case of allodial property, the same rule operates. The Sovereign makes up no title on his succession to the Crown lands; nor does the Prince to the principality lands in Scotland. But, when either the Prince or Sovereign succeeds as heir to a subject, some title, though apparently not always a complete feudal title, is required. King Charles I., whilst Prince, succeeded as heir of his mother to the Lordship of Dunfermline, and made up his title by obtaining from his father, King James I., a precept from Chancery under the Quarter Seal (something very like a precept of *clare constat*), for infefting him in the lands as heir of his mother, on which he was infeft by the Sheriff-Principal of the county of Fife.¹ The precept, which is peculiar in form in several particulars, expressly recites that there was in this case no need of a service, and dispenses with such service. Again, King Charles II., when he succeeded through Lord Darnley to the Dukedom of Lennox, established his title by special service as heir to the Duke. It does not appear that the King expedite any title further than the special service.

The rule that no title is necessary obtains also in the case of honours and dignities; the udal lands of Orkney and Shetland; leases (except where the benefits of the Leases Registration Act are available, and are actually to be put in operation); and heirship moveables. But, as to all proper feudal and burgage subjects, the rule, that writing is indispensable in order to the transfer of subjects once vested, holds in reference to transfers from the dead to the living, as well as those *inter vivos*; and writing is accordingly necessary in order to vest the subjects in the heir with the active rights of proprietor. Leases, moreover, where within the scope of the Leases Registration Act, require a title in the person of the heir before he can avail himself of the benefits of that Act.

The forms of title vary according to the state and nature of the predecessor's title. If such title was made real by complete infeftment or registration, the heir must obtain a real title by infeftment or registration before he can actively deal with the subjects. If, again, the predecessor's title was personal only, the heir does not require a real right in order to his having an active title. A personal title is enough for that purpose; and when the ancestor's infeftment followed on a disposition with an *a me* holding only, which was not confirmed by the superior, and the infeftment, therefore, was not complete and indefeasible, a personal title in favour of the heir carried the right under the disposition.²

I will first consider the mode of making up the heir's title where his predecessor had a real right by complete infeftment or registration, and will examine the forms in operation before the passing of the Conveyancing Acts of 1847,—for which Acts we are indebted to the greatest master of Conveyancing in modern times, the late Lord Rutherford. And I will

¹ The instrument of sasine in his favour is dated 6th and recorded in the General Register of Sasines at Edinburgh 19th July 1619.

² Douglass, 10th July 1713, M. 3008.

examine, in the first place, the case where the predecessor had an infeftment holden of the Crown as superior, and fully completed at the time of his death.

CROWN PRE-
CEPT OF *clare*
constat.

Until the passing of the Acts of 1847, the only mode of obtaining infeftment in feudal subjects in favour of the heir, when the predecessor had been infeft, was by going to the superior for a precept or mandate, addressed, in certain cases, to the Sheriff of the county, in other cases, to any one as Sheriff in that part, and in other cases, to the superior's bailies in that part, directing the sasine or infeftment to be given. The form and manner in which superiors were in use to grant new infeftments to heirs had a history not unlike that of the new infeftments granted to strangers. There is good authority for stating that, in the infancy of the feudal system, superiors not only granted investitures to new proprietors, when constituting the relations of superior and vassal, but renewed to the heirs of vassals the investitures which had fallen by their ancestor's death, in presence of the *pares curiæ*. The fact of the heir's propinquity would, in those times, be well known to the superior; and, even after charters and precepts were introduced, there could still, on the part of the great majority of subject-superiors, be no doubt as to the nearest heir. The practice, therefore, in such cases was for the superior to issue the precept of sasine in respect of his private knowledge of the fact of the heir's propinquity; and subject-superiors are still in use to grant precepts or writs, called, from words occurring in the precept when it was written in the Latin language, 'precepts' or 'writs' 'of *clare constat*,' in favour of the heirs of their last vassals, on the strength of their own knowledge of the propinquity, without requiring judicial proof thereof.

SPECIAL
SERVICE.

But in the case of the Crown, where private knowledge is in a great measure excluded, it became essential that legal evidence of the heir's propinquity should be adduced; and this was done by a proceeding called a Service, being the verdict of a jury pronounced after regular trial and inquisition in presence of a Judge, establishing the facts on which the heir's claim to a new title depended.

BRIEVE OF
INQUEST

In the case we are now considering,—that is, where the predecessor had an infeftment holden of the Crown as superior, and fully completed at the time of his death,—there was required, as the first step towards the heir's infeftment, a Special Service,—so called, because it had reference to lands specially or particularly described; and, with a view thereto, a writ called a *brief of inquest* (*breve de inquisitione*) was issued from the Chancery, on the application of the heir or claimant. This was directed to the Sheriff of the county within which the lands were situated; except in certain cases, in which formerly the macers of the Court of Session, with some of the Judges as their assessors, and latterly the Sheriff of Edinburgh, had to act. The *brief*, which was authenticated by the subscription of the acting Director of Chancery, appointed inquiry to be made on seven heads hereafter specified.

The brieve was executed edictally at the market-cross of the head burgh of the county within which the lands were situated, on market day and at market time. The execution, which was on fifteen days' *induciae*, was made by a sheriff-officer of the county in which the lands lay, acting under order of the Sheriff, or Sheriff in that part, as the case might be. After expiry of the *induciae*, the brieve and executions were presented to the Sheriff in a Court of Service held by him under the authority of the brieve. If the service was before the Sheriff of the county where the lands lay, the Sheriff-clerk of that county was clerk of the Court of Service *ex officio*; if before a Sheriff in that part, a clerk of Court was specially appointed by the Sheriff, and sworn. Then a jury of fifteen men was empanelled and sworn; and, a chancellor being elected, the heir or his procurator produced and proceeded to read and prove the claim of service, which was addressed to the jury in name of the heir.

The claim contained statements on the heir's part, intended, when verified, to enable the jury to return an answer to the inquiries contained in the brieve. These statements were accordingly directed *seriatim* to the seven heads of inquiry under the brieve.

On the *first* point,—In what lands the predecessor died last vest and seised at the Royal faith and peace,—the claim stated that the deceased died at the faith and peace of the Sovereign, last vest and seised in the particular lands, conform to the writs in his favour which were specified. Two witnesses, who might be jurymen, proved the death of the predecessor. The writs proved his infestment; and it was assumed that he died at the Royal faith and peace.

On the *second* point,—Whether the claimant was the nearest heir of the deceased in such lands,—the claim stated the relationship between the parties; and when there were connecting links, as in the case of a grandson, or uncle, or cousin, or more distant relation, it was usual and proper to specify every link. The proof on this head might be parole or written, or partly both; and jurymen could be witnesses.

The *third* head,—Whether the heir was of lawful age,—was always answered in the affirmative after the abolition of ward-holding. The inquiry had its origin in the right of the superior to refuse to grant an entry to a ward-vassal whilst in minority, unless specially bound to do so; because minors were held unfit for military service. No proof was called for on this point.

The *fourth* head was—What are the lands now worth yearly, and what were they worth in the time of peace? This inquiry had reference to two general valuations of lands in Scotland, both of very old date.¹ The object of the inquiry was to obtain the *data* for charging the casualty of non-entry—the duties falling to the superior in lieu of his ancient right to possess the lands themselves during the time he was without a vassal therein. In very early times the superior had right to the whole rents during the non-entry; but his claim came to be restricted to the amount

¹ Duff's Feudal Conveyancing, p. 462.

at which, by the return or reply made by the jury on a special service, commonly called the 'retour' of the service, the lands were rated as 'now worth.' Such amount came to be known as the 'retour duties' (that is, the duties specified in the retour), or 'new extent,' as contradistinguished from the worth of the lands in time of peace, or the 'old extent,' though that also was specified in the retour. The retour duties (the particulars of which were explained in a former branch of this Course¹) are still exigible during the period whilst lands are in non-entry, and the superior without a vassal therein; and they are ascertained now on the same principles as formerly.

The *fifth* head of the brieve was—Of whom are the lands held? This was instructed by production of the last charter, or other writ, flowing from the Crown.

The *sixth* head—By what service are they held?—was instructed in like manner; and under these two heads were set forth the *tenendas* and *reddendo* at full length, as contained in the last charter or other Crown writ.

The *last* head was—In whose hands are the lands now, for what reason, and how long have they been so? The objects of this inquiry were to ascertain to whom, and for what period, the casualty of non-entry was due. When the Crown was not excluded by a liferent-vassal or otherwise, the answer was that the lands were, and had been, in the hands of the Crown as the superior, by reason of non-entry, since the death of the last vassal; the precise date of which was then stated. On this point the proof might be parole or written.

The claim concluded with a petition or prayer by the heir to be served and cognosced heir of the deceased in the lands specified; and it was signed by the heir, or his procurator duly authorized. After the claim was read and verified by proof, the jury pronounced their verdict, affirmative of the claim. The verdict was authenticated by the subscription of the chancellor of the jury; and, the Judge's authority being interponed, the clerk to the service prepared the retour, or return of the jury in reply to the brieve. This was a finding by the jury upon oath, in exact conformity with the heir's claim, *mutatis mutandis*. The retour bore to be authenticated by the seals of the majority of the inquest; and ancient retours are to be found with the seals of the inquest, or some of them, appended; but in modern practice the only authentication was the subscription of the clerk to the Court of Service. The retour always was lodged in the Chancery; and it was of no avail until so lodged, or 'retoured,' as it was termed,—that is, returned. It was always accompanied by the brieve and its executions; and in terms of the Act 1 & 2 Geo. IV. cap. 38, sect. 12, the claim of service, verdict of the jury, depositions of the witnesses, and minutes of procedure or acts of the Court of Service (which used formerly to remain in the hands of the clerk of Court) were transmitted to Chancery along with the retour. An extract or '*vera copia*' of the principal retour was usually given out from

¹ See *ante*, p. 582.

the Chancery to the heir, under the hand of the acting director. The transmission of the brieve, retour, and other papers to Chancery completed the first step of the heir's title. The Director of Chancery then prepared and issued a Precept of Sasine, usually called a Precept from Chancery, directed to the Sheriff of the county within which the lands, or some portion of the lands, were situated, and authenticated by the subscription of the Director of Chancery only, and passing no seal. The precept, on the narrative of the findings in the retour, contained an order to the Sheriff to give the heir sasine of the lands. When the lands in the retour were situated in different counties, it was necessary to issue a separate precept to the Sheriff of each of the counties, directing him to give sasine of the lands situated within his county; unless, as most frequently happened, the lands were united into a barony, or were contained in a Crown charter with a clause of union and dispensation, authorizing sasine of the whole lands, wherever situated, to be given on the ground of any part of the lands in the charter. In such case, the whole lands might be embraced in one precept, directed to the Sheriff of any one of the counties within which the lands were respectively situated; and such Sheriff could give sasine of the whole upon the ground of that portion which lay within his own county. When there was a mansion-house on the lands, it was usual to give sasine at the mansion-house for the whole lands, and to direct the precept accordingly.

OLD FORM OF
CHANCERY
PRECEPT.

In this precept the Sheriff was desired to take security for the non-entry duties and the casualty of relief, the amount of which was stated. The non-entry duties were calculated up to the term of Whitsunday or Martinmas immediately preceding the date of the precept; and in order to secure to the Crown the payment of further non-entry duties, in case such should become exigible by delay in taking sasine, the precept was declared to be of no avail as a warrant for sasine after the term of Whitsunday or Martinmas next following its date. It was therefore absolutely necessary to have sasine passed on a Chancery precept before such term. The precept, moreover, was strictly personal. It neither devolved upon the heir of the grantee, in case of his death, nor was it assignable by the grantee; and it likewise fell by the death of the granter, though it was not expressly excepted, along with precepts of *clare constat*, from the operation of the Act 1693, cap. 35.

The instrument of sasine was, like its warrant, written in the Latin language. The Sheriff-clerk of the county in which the lands, or that portion of the lands where the sasine was given, were situated officiated as the notary; and the sasine had to be given by the Sheriff of the county, to whom alone the precept was directed. The sasine had to be recorded within sixty days after its date, and the registration completed the heir's title. It was not necessary, however, that the registration should take place before the term of Whitsunday or Martinmas following the date of the precept. It was enough if the sasine was dated before that term.

MODERN FORMS. The procedure for the completion of the heir's title was regulated, and greatly simplified, by the Services of Heirs and Crown Charters Acts of 1847.¹

A service was retained as the first step, and as the warrant of a precept; but a special service was not required, and even when a special service was expedite it was enough to prove in it the predecessor's death, the time when it took place, the ancestor's infestment in the particular lands, and the heir's propinquity. The particulars necessary for assessing the casualties of non-entry and relief were instructed extrajudicially. But the Crown Charters Act, by sect. 19, authorizes Chancery precepts to be issued upon general services, which prove, *inter alia*, the ancestor's death, the time when it took place, and the heir's propinquity; leaving the fact of the ancestor's infestment to be proved extrajudicially, along with the particulars for assessing the casualties; and, in the completion of titles as heir to an ancestor who was infest as a Crown vassal, the special service is never made use of in practice. We shall have occasion to consider the form of the special service, as regulated by the Services of Heirs Act, in connexion with the titles to lands in which the ancestor was infest in virtue of a disposition in ordinary terms, but without a Crown charter; and here I will examine the General Service, being the writ usually employed in the case before us.

Prior to the passing of the Services Act, the general service proceeded on a brieve from Chancery, directed to a particular Judge, in presence of such Judge, and before a jury, as in the case of the special service; the facts proved in the general service being simply the predecessor's death and the heir's propinquity. It now proceeds in a different way.

**PETITION FOR
GENERAL
SERVICE.**

The first step towards the service is a petition in name of the heir, addressed to the Sheriff of the county in Scotland within which the deceased had his ordinary or principal domicile at the time of his death, or, in the petitioner's option, to the Sheriff of Chancery (an office constituted by the Services Act); unless the deceased had no domicile in Scotland, in which case the service must be before the Sheriff of Chancery. The petition for general service sets forth—

1. The death of the ancestor, the day of his death as nearly as may be, and that he had his ordinary or principal domicile within a certain county in Scotland specified, or furth of Scotland, as the case may be. Sometimes, where the death happened of an old date, it is impossible, after the most careful inquiry, to ascertain the exact date, and nice precision in such cases is not required. In similar cases, there may also be a difficulty in proving the domicile; and, if the decease happened upwards of forty years prior to the date of the petition, it is now unnecessary to prove the domicile. It is enough, so far as regards the domicile, for the heir to state in his petition,—and if required in the Court of Service to make oath,—that he is unable to prove the domicile.²

¹ 10 & 11 Vict. c. 47 & 51.

² Titles Act of 1858, s. 30.

2. The petitioner's propinquity to the deceased, and that he is the nearest lawful heir in general of the deceased, or as the case may be.

GENERAL
SERVICE.

And then the petitioner prays the Judge to serve him heir to the deceased accordingly.

The petition, of which a form is given in schedule (A) of the Act, is signed by the petitioner or his mandatory, who must have special power to sign the petition, or special powers embracing authority to sign. The petition is then presented to the Sheriff, and by his orders edictally published both in Edinburgh, at the office of the Keeper of Edictal Citations, and in the county of the domicile (when that was within Scotland, and is to be proved), as provided by the Statute, sect. 7; and the service is not to proceed till after the publication has been duly made and officially reported. Neither is the service to proceed, nor is any evidence to be led for proving the petitioner's statements, until fifteen days after the publication has taken place, when the deceased had his domicile in Scotland, or thirty days after such publication if he was furth of Scotland, or in Orkney or Shetland. When the domicile is not to be proved, the procedure is to be regulated as in the case of services to parties domiciled furth of Scotland.¹

After the periods above specified respectively, the evidence may be led, and the service may proceed. The evidence may, as formerly, be parole or written; and it may be given either before the Sheriff in the Court of Service, or (sect. 10) before the provost or any of the bailies of any city or royal burgh;—the Act authorizing these official persons, without special appointment, to receive the evidence; or the evidence may be given before any commissioner to be specially appointed for that purpose by the Sheriff to whom the petition for service is presented. The parole evidence is to be taken down in writing; and a full and complete inventory of the documents produced is to be made out and certified by the Sheriff or commissioner. And, on considering the evidence, the Sheriff is, without the aid of a jury, to pronounce judgment, serving or refusing to serve the petitioner, as shall be just.

In case of the Sheriff's refusal to serve, the Act makes provision for appeal to the Court of Session; but the service must be by the Sheriff; and the Court of Session, even if in favour of the petitioner, cannot actually serve. The Court will in that case direct the Sheriff to serve.²

When a judgment has been pronounced by the Sheriff in favour of the petitioner, the Sheriff-clerk is forthwith, on the petitioner's application, to transmit to the Office of the Director of Chancery the petition and judgment, and the proof taken down in writing, and the inventories of written documents made up and certified as aforesaid, and also any other parts or steps of the process (sect. 12). The judgment is thereupon to be recorded by the Director of Chancery; and an authenticated extract thereof is to be prepared and transmitted to the Sheriff-clerk of the county, to be by him delivered to the party or his agent. In practice,

¹ Titles Act of 1858, s. 30.

² Braid's case, before cited.

the extract of a judgment, or decree of service, by the Sheriff of Chancery, is obtained by the party from the Chancery direct.

**DECREE OF
SERVICE.**

The decree of service, so recorded and extracted, is declared equivalent to the extract of the retour of a service duly retoured to Chancery according to the old law and forms (sect. 13). The effect of the service in the new and old forms is thus the same; and the main difference consists in this, that, under the old form, the facts were proved in a trial before a jury; under the new form, they are proved in a process before a Sheriff.

So far, the proceedings, with a view to obtain a real right in favour of the heir of a party who held a complete title as a Crown vassal, are regulated by the Services of Heirs Act. These proceedings instruct the death of the ancestor, the time of his death, and the heir's propinquity.

**MODERN
CHANCERY
PRECEPT.**

We now turn to the Crown Charters Act, by which (sects. 18 & 19) it is provided that precepts of sasine from the Crown, or precepts from Chancery, may proceed either on special services in the particular lands for infeftment in which such precepts are sought, or on general service, and on the following writs being lodged with the Presenter of Signatures, viz. :—

1. The charter (or other writ flowing from the Crown) of the lands in question, with the sasine thereon in favour of the applicant's ancestor. To such charter or other writ and sasine, a charter or other writ with warrant of registration and duly registered, or with notarial instrument, where that is competent, will now be equivalent.

2. The decree of the applicant's special or general service as heir of such ancestor.

3. The draft of a precept of sasine by the Crown in favour of the applicant as heir foresaid; which draft must, like the draft Crown charter, be prepared and indorsed by a Writer to the Signet; and

4. A note, signed by the Writer to the Signet, praying that the precept may be granted accordingly.

The procedure which follows is substantially the same as in the case of the draft Crown charter under the Crown Charters Act. The draft precept is revised by the Presenter of Signatures; and when docketed by the agent of the party as revised and approved of, and officially transmitted to the Chancery, it forms the warrant for a precept from Chancery in terms of the revised and adjusted draft, which precept is to be engrossed and recorded, and delivered to the party. Until the Titles Act of 1858 came into operation, the precept formed the warrant for sasine in favour of the party. But it was not addressed to the Sheriff of the county; nor was the Sheriff-clerk necessarily the notary to the infeftment. It was addressed to any notary-public to whom it might be presented; and any notary, accordingly, could give the infeftment. It contained no express declaration, like the old precept, that it should be null in case infeftment were not passed before the next ensuing term of Whitsunday or Martinmas; but the Infeftments Act of 1845, sect. 6, contained such declaration,—so that the rule on that point remained

unchanged; and the precept was not assignable to a third party; nor did it devolve upon the heir of the grantee in case of his death before infetment. It was strictly personal, and warranted infetment in favour of the grantee only. An instrument of sasine in ordinary form in his favour completed his title, and fully vested him in the lands. The precept passed no seal, and, like the precept in the old form, was authenticated by the subscription of the Director of Chancery only. It was in the English language, as was also the sasine upon it.

These were the forms in use under our older law, as altered by the Conveyancing Acts of 1847. Now, by the Titles Act of 1858,¹ sect. 1, CROWN WRIT OF sasine is declared unnecessary; and, consistently with that enactment, clare constat. the precept, which was an order to give sasine, is superseded by the Crown Writ of *clare constat* authorized by the Act (sect. 11) and relative schedule (G). This writ is in exact conformity with the superseded precept, as far as regards its narrative, or statement of the facts or grounds on which it proceeds. But whereas, in what may be called the conclusion, the precept contained an order to give sasine, the writ simply declares the party served to be the heir entitled to succeed to his ancestor in the lands. The writ is obtained and authenticated exactly as the precept was; and registration in the appropriate register of sasines completes the heir's title. But the registration ought to take place before the term of Whitsunday or Martinmas next after the date of the writ.

We have seen that the decree of general service, preliminary to the precept from Chancery, takes no notice of the ancestor's infetment. That infetment is proved to the Presenter of Signatures by the production of the ancestor's titles. And neither the decree of general nor that of special service bears that the petitioner is of lawful age,—there being no object now in inquiring as to the petitioner's age. They say nothing as to the *tenendas* or *reddendo* of the lands, which are proved by the charter or other Crown writ produced to the Presenter of Signatures; nor as to the party in whose hands the lands are and have been by reason of non-entry;—these being legal results flowing from the facts otherwise brought out in the proceedings, or capable of being separately instructed, and with which it is unnecessary to cumber the proceedings in the Court of Service. Nor does the service, whether special or general, notice the new extent or retour duties of the lands, or the other data for fixing and assessing the non-entry duties payable to the Crown. These duties are, by sects. 6 and 18 of the Act, appointed to be ascertained and fixed by the Presenter of Signatures, with the aid of the auditor of Exchequer. They are fixed by these officials according to the principles already explained as applicable to the case of the infetment of heirs by special service and precept from Chancery in the older form; and the amount due must be paid before the precept is delivered (sect. 18).

We have hitherto been considering the case of the titles and entry of an heir whose ancestor had a complete title, holding of and under the Crown as his immediate superior. We shall now examine the procedure,

¹ 21 & 22 Vict. c. 76.

ANCESTOR
INFECT BUT
NOT ENTERED.

under the old and new systems, applicable to the case of the ancestor having a disposition from a Crown vassal, of lands which, either expressly or by force of Statute, are to be holden *a se vel de se*, with procuratory of resignation and precept of sasine, followed by sasine. Such ancestor might have become a Crown vassal by obtaining a charter of confirmation from the Crown; in which case his heir would have proceeded by service and precept or writ, as we have already shown. But we are to suppose that the ancestor had not obtained any Crown charter. He was simply infeft. But he had in his disposition a procuratory of resignation from the last vassal. Before the Crown Charters Act was passed, the heir proceeded as follows in making up his titles:—He first connected himself with the procuratory of resignation contained in the disposition to his ancestor, by expeding a general service as heir to him. This service could be expedite before any Judge Ordinary. Being expedite and retoured to Chancery, it gave the heir right to the procuratory of resignation in the disposition to his ancestor; such procuratory being a personal right in the person of the ancestor. By virtue of the procuratory and retour of general service, the heir obtained from the Crown a charter of resignation, on which he was infeft. He thereby transferred to himself the mid-superiority, or immediate superiority, of his ancestor's infeftment; and then, in the character of superior of that infeftment, he granted to himself a precept of sasine, called a precept of *clare constat*, for infefting himself as heir of his ancestor in the property-fee contained in that infeftment. The terms of the precept of *clare constat* I will explain when treating of the completion of titles by heirs to lands held of subject-superiors. It is enough here to say that it is substantially the same writ as the precept from Chancery already examined. The heir then expedite an instrument of sasine in his favour, on the precept of *clare constat*, whereby he completed his title to the property of the lands contained in his ancestor's unconfirmed infeftment. Being separately infeft in the superiority, in virtue of the charter of resignation from the Crown, and sasine thereon, he had to unite and consolidate these two separate fees or feudal estates; for which purpose he, as vassal in the property-fee, granted procuratory of resignation *ad remanentiam* in his own favour as superior, and expedite and recorded instrument of resignation *ad remanentiam* thereupon in his own favour.

Under the system introduced by the Conveyancing Acts of 1847, there were two courses open to the heir, both of which were free of the great cumbrousness of the older form.

1. Under the Crown Charters Act, sect. 21, the heir, after expeding general service as before explained, might apply to the Crown, through the Presenter of Signatures, as in any ordinary case, for a combined charter of confirmation and precept of sasine;—the charter of confirmation confirming the lands and the disposition and sasine in favour of the predecessor. By this charter, and in virtue of the retroactive effect of the confirmation, the ancestor was held to have died infeft and entered as

vassal of the Crown. The charter of confirmation so granted had the same effect as if it had been granted to the ancestor during his lifetime; and the precept of sasine formed a warrant for infeftment of the heir, just as in an ordinary case the separate precept operated as a warrant for such infeftment in favour of the heir of a party who had died actually infeft under the Crown. This combined charter and precept was written in Chancery, and signed by the Director of Chancery and Keeper of the Union Seal, exactly as an ordinary charter from the Crown. The precept, however, was personal, and authorized sasine in favour of the grantee only; and it fell to the ground if not executed in his favour during his lifetime. When infeft, his title was complete; and there was here no need, in fact no opportunity, for consolidation. There had been no separation of the superiority and property fees.

2. Under the Services of Heirs Act, the heir might obtain a decree of special service in his favour, as heir of his ancestor in the particular lands contained in the disposition and sasine in favour of his ancestor. In this case the petition for service was addressed either to the Sheriff of the county in which the lands were situated, or, in the petitioner's option, to the Sheriff of Chancery. The deceased's domicile, or want of domicile in Scotland, did not affect the question of who was to be the Sheriff in the service. The petition, therefore, and proof and decree took no notice of the domicile. The petition bore that the predecessor died on or about a day specified, last vest and seised in the lands, conform to the disposition and sasine in his favour, describing these by their dates and other particulars, as in schedule (B) annexed to the Act. In specifying the date of the death, it will be found better to specify the year of God, rather than to say 'the day of last,' even where such an expression would be perfectly accurate; because there immediately follow the words 'last vest and seised.' The petition then states the petitioner's propinquity, and that he is heir in special of the deceased in the lands, and prays that he may be served accordingly. The procedure and proof are similar to those in the case of the general service. But the Act, sect. 21, made a provision of very great value in connexion with decrees of special service. It was there enacted, that, for the purpose of completing the feudal title of the heir served, but of such heir only, every decree of special service should contain a precept of sasine; and that such decree, being recorded and extracted, should to all intents and purposes be held equivalent to, and have the full legal operation and effect of, a disposition in ordinary form granted by the party deceased, and who was last infeft in the lands, to the heir so served, containing obligation to infeft *de se*, or *a se* by confirmation only, with assignation to writs and precept of sasine in common form. It was further enacted, that the decree of special service might be used by the party served in like manner as if it had been a disposition from his ancestor with the above clauses. And the party served was declared entitled to be infeft on the precept as on an ordinary precept. But the decree was not transmis-

sible to the effect of authorizing infestment in favour of the party's heir or assignee. Nor was it equivalent to a disposition in favour of the heir, in virtue of which alone, and without being infest, he had right to dispose the lands to a third party.¹

The heir, having obtained his decree of special service with precept of sasine, could expedite instrument of sasine in his favour in usual form; and his title could be made complete by Crown charter of confirmation, confirming both his ancestor's and his own sasines, and their warrants, in terms of schedule No. 2, annexed to the Crown Charters Act, or confirming the lands and his own sasine thereof in terms of schedule No. 3. In this case, also, the property and superiority remained unseparated, and there was no room for union or consolidation.

The Titles Act of 1858, sect. 11, provides for the case we have just examined, as well as for the case of the heir of an ancestor who had a complete Crown infestment. Writs of *clare constat* can be obtained from the Crown equally when the predecessor had a title flowing from a Crown vassal, but not completed by the Crown's confirmation, as when such predecessor had a complete title from the Crown. The writ of *clare constat*, in the former case, operates confirmation of all the titles necessary to be confirmed in order to complete the investiture of the party obtaining the same. Precepts from Chancery are likewise declared to operate such confirmation; so that in no case is a combined charter of confirmation and precept of sasine required from the Crown. The registration of the precept or the writ in the Register of Sasines, with warrant in due form, will complete the title. Registration of a decree of special service, with warrant thereon, will now have the same effect as an instrument of sasine thereon formerly had; and the decree will now contain no precept or warrant of sasine.

The forms we have been considering are those applicable to the entry of heirs with the Crown, where the predecessor had a real right, either directly from the Crown or under a disposition from a Crown vassal.

PERSONAL
RIGHT IN
ANCESTOR.

If the ancestor was not infest or registered, and had only a personal right, then, supposing such personal right to be contained in a charter of resignation from the Crown, the heir had, as he still has, to expedite a general service as heir to his ancestor in order to vest the heir in said personal right. He would then, before the Titles Act came into operation, have expedited an instrument of sasine in his favour in virtue of the Crown charter of resignation and decree of service, which would complete his title. Now, he will expedite a notarial instrument in virtue of the same writs.

If the ancestor had merely obtained a disposition, the heir would have to expedite a general service as before, in order to vest in him the personal right contained in the disposition, with the procuratory of resignation and precept of sasine, if any, in that deed. He would then, before the Titles Act came into operation, have obtained a charter

¹ Lockhart, 19th July 1854, 16 D. 1109.

of resignation, following on the procuratory in the disposition to his ancestor, and on the decree of general service; and he would expedé sasine on the charter; or he would expedé sasine on the precept in the disposition to his ancestor and decree of general service, and obtain charter of confirmation in due form; or it might be that the circumstances rendered a combined charter of resignation and confirmation advisable. As to all such charters and forms of title, the heir, after obtaining decree of general service, stood in a position identical with that of the assignee to a disposition containing procuratory of resignation and precept of sasine, and not followed by infeftment. The general service operated in favour of the heir just as a disposition and assignation operated in favour of the assignee; and the heir proceeded exactly as has been formerly explained as applicable to the case of the assignee.¹ Now, a writ of resignation can be obtained in place of a charter of resignation, or of the combined charter of resignation and confirmation; and the registration of the disposition, with the writ of resignation thereon, will complete the title by resignation; or a notarial instrument can be expedé and recorded, in virtue of the disposition and decree of service; or, if the notarial instrument does not set forth the disposition fully, the disposition will be recorded along with the notarial instrument. In either of the cases where a notarial instrument is made use of, a writ of confirmation by the Crown can be written thereon, which will complete the title by confirmation.²

ENTRY BY
RESIGNATION.BY CONFIRMA-
TION.

These observations relate to the titles of heirs to lands of which the Crown is the superior. We shall now consider the mode of procedure when the superior is a subject; in which case the principles are the same, and the forms of the writs are not materially different.

ENTRY WITH
SUBJECT-
SUPERIORS.

I take first the case of the ancestor infeft in virtue of a warrant granted or confirmed by the superior.

ANCESTOR
ENTERED.

In the case of the Crown, we have seen that the titles in the corresponding case were formerly special service, precept of sasine from Chancery, and instrument of sasine;—afterwards, decree of general or special service, precept of sasine from Chancery, and sasine;—and now are decree of service as before, and writ of *clare constat*, registered. The subject-superior may, if he thinks fit, require the heir to prove his propinquity by a general service as heir of his predecessor; but the demand for such a service is rarely met with. Before the Titles Act of 1858 came into operation, it was usual for the superior at once to grant voluntarily a precept of sasine, called a precept of *clare constat*, in favour of the heir. By this precept the superior, as such,—and on the recital that *it clearly appeared* (in the present tense, *clare constat*) that the ancestor died last vest and seised in the fee of the lands, and that the grantee of the precept was his heir, and was of lawful age (a statement which the Conveyancing Acts of 1847 did not strike out of the subject-

¹ See *ante*, p. 709, *et seq.*

² Titles Act of 1858, s. 6 & 8.

superior's precept), and that the lands were holden of him, as superior, in feu or blench farm, as the case might be, for payment of the feu or blench duties specified,—granted precept or mandate for infeftment of the heir in the lands. Before the Infeftments Act of 1845 came into operation, the precept was directed to the superior's bailies in that part specially constituted. Thereafter it was directed, as other precepts were, to any notary-public to whom it might be presented. The precept said nothing as to non-entry duties; but these were due in the case of subject-superiors equally as in the case of the Crown, and on precisely the same principles.

The precept of *clare constat* was, like the precept from Chancery, personal, and available to the heir only. It was specially excepted from the Act 1693, cap. 35, making other precepts of sasine available after the death of either granter or grantee, or both. But by the Transference of Lands Act of 1847,¹ all precepts then valid, and all future precepts, were declared good notwithstanding the subsequent death of the granter, and were made capable of being used as warrants of sasine at any time during the grantee's life. Formerly, the heir's title was completed by sasine on the precept; now, the superior grants a writ of *clare constat*, the registration of which, with warrant in due form, completes the heir's title.

In the above case, the heir has it in his option to proceed by decree of special service, the form of which I have already spoken of. If the procedure took place before the Titles Act of 1858, the decree would contain precept of sasine, and would be followed by instrument of sasine, and charter of confirmation from the superior; and if the superior was not at hand, or if his titles were incomplete, and in various other circumstances, it might be necessary to resort to this mode of procedure. In corresponding circumstances, it may still be necessary to resort to a special service, and complete the title by registration of the decree, and writ of confirmation. But it will be observed that the form by service requires two writs, in place of one only, for making the title complete; and the writ of *clare constat* is thus preferable, where there is no particular reason for adopting the other course.

It may be, however, that the ancestor was infeft in several lands held of different superiors. In that case, a special service applicable to the whole,—with separate charters or writs of confirmation from each superior, as applicable to the lands of which he is superior,—will be a simpler title, and less expensive than a title by expeding and recording separate writs of *clare constat* from each superior.

Supposing again the ancestor to have been infeft in virtue of a disposition with *a me vel de me* holding,—the usual course, prior to the operation of the Titles Act of 1858, was for the heir to obtain from the superior a charter of confirmation and precept of *clare constat* combined; the charter confirming the ancestor's sasine and its warrant, and the precept granting warrant for infefting the heir in the lands as heir.

¹ 8 & 9 Vict. c. 35.

² 10 & 11 Vict. c. 48, s. 15.

Infeftment on this charter and precept completed the title. The heir, however, after the passing of the Lands Transference Act, had the option of proceeding by special service, instrument of sasine thereon, and charter of confirmation from the superior both of his own and his ancestor's sasines and their warrants. Now, he can take a writ of *clare constat* (which operates confirmation of all deeds and instruments necessary to be confirmed, in order to the completion of the title); and he can register the writ; or he can expedite and register a special service, and take a writ of confirmation from the superior.

These two last-mentioned forms likewise have been explained, in reference to the titles of lands of which the Crown is the superior.

The proceeding, where the ancestor was not infeft, corresponds exactly in the case of lands held of subjects with that in the case of lands of which the Crown is the superior; and it is therefore unnecessary to go over the forms. ANCESTOR NOT
INFEST.

The forms we have been considering are applicable alike to the titles of heirs of line and heirs of conquest. The only difference in the form of writing is, that the heir of line is described in his titles as 'nearest and lawful heir,' or 'nearest and lawful heir of line,'—whereas the heir of conquest is described as 'nearest and lawful heir of conquest,'—of the deceased, 'in special' or 'in general,' as the case may be. But, when the same individual is heir both in heritage and conquest,—for instance, when the eldest son succeeds to his father,—he ought to be described in the titles of conquest, equally as in those of heritage, simply as 'nearest and lawful heir in general' or 'in special' of his predecessor.

We have hitherto been considering the case of succession under the general destination to a party and his 'heirs,' or his 'heirs whomsoever,' both of which have the same legal meaning and effect, as has, likewise, the destination simply to the party himself individually, if there is no further destination or substitution of heirs. We are now to notice some cases in which there is a special destination, or a destination to a particular class or series of heirs, and the variations in the forms of the titles applicable to such cases respectively.

Whenever the destination in a conveyance is not simply to the dis- poncee without mention of heirs or substitutes, or to him and his heirs or his heirs whomsoever,—whenever the granter of a conveyance takes upon himself to point out or provide the order or series of the heirs who are to succeed,—these heirs are called heirs of provision, or of tailzie and provision. They succeed not simply in virtue of the Common Law or legal rule of succession, but because the deed has called them,—not *destinatione legis*, but *provisione hominis*. And it does not matter that the heirs so called happen to be the very heirs whom the law points out independently of the deed. Their right has been made to depend on the deed, not on the law; and in making up their titles as heirs they must connect themselves expressly with the particular deed, and prove HEIRS OF
PROVISION.

that they are the heirs of provision, or of tailzie and provision, under that deed. Thus, if the destination is to A. and the heirs of his body, that is, for two generations at least, the legal order of succession,—and the eldest son of A. will have the same right as if the destination were to A. (his father), and his heirs whomsoever. But the eldest son, in his service or other title, will be described not simply as nearest and lawful heir to A., but as nearest and lawful heir *of provision* to him under and by virtue of the deed containing the destination.

The rules in this respect are the same whether the service is general or special; and a general service as heir in one character will not transfer to the heir rights held by his ancestor under a destination in favour of such ancestor and heirs of a different character,—although it may happen that both characters are possessed by the heir expeding such service. Thus, where the destination in a marriage-contract was to the heirs-male of the marriage (which was the husband's second marriage), and the eldest son of the marriage served himself simply heir-male of his father,—it was found that he had not connected himself with the marriage-contract, and had not vested the right under that deed in himself. In point of fact, he was heir-male of the second marriage. But the heir-male of his father was not necessarily heir-male of that marriage. The service, therefore, did not prove that he was heir-male of the marriage. He ought to have been served heir-male of the marriage, and so heir of provision in general, or in special, under the contract.¹

In a somewhat early case, where the heir's character, established by his service, implied, as a matter of absolute necessity, that he possessed the proper character, the service was sustained as equivalent to a service in the proper character. This was the service of a son as nearest and lawful heir of his father, which was held sufficient as a title to transfer to the son a conveyance in favour of his father and the heirs-male of his body.² But I have had occasion to see an opinion of Lord Rutherford, in which the authority of this case is treated as doubtful in consequence of the later decision in Cathcart's case; and I think the Haldane decision ought not to be relied on. Where, again, the service was of the right party, and correctly set forth the deed under which he had right to certain lands, it was sustained though expedite in the character of heir of provision, whereas it should have been as heir of line, the deed being simply in favour of the deceased and his heirs or assignees.³ But where the destination was to A. and his heirs or assignees, whom failing, to B. and his heirs or assignees, and B. served himself simply as nearest and lawful heir of A., it was held that though he was the nearest and lawful heir of A., as well as heir of provision to him by the deed, yet, in order to connect himself with the deed containing the destination, he ought to

¹ Edgar, 21st July 1738, M. 14,015, 2
Ross's L. C. 522, 548, 596, 599. The same
rule is laid down in Cathcart, as reversed
24th Nov. 1807, 2 Ross's L. C. 525; and

Duke of Queensberry's Trustees, 21st Jan.
1819, Hume, 727.

² Haldane, 27th Nov. 1766, M. 14,443.

³ Bell, 21st June 1749, M. 14,016.

have been served as heir of provision; and that, for such purpose, the service he expedie was inept.¹ And there can be no doubt of the proper rule on this point, viz., that the service ought to be strictly in the true legal character, and not merely in a character which, by implication, infers the existence of that character. Service is an *actus legitimus*, to which strict rules are applied. This is forcibly laid down by Lord Chancellor Eldon in Cathcart's case; and so strongly does this rule hold, that even though there are two deeds, with special destinations to particular heirs, and in which the destinations are actually the same, a service as heir of provision under the one deed does not operate or imply service under the other deed, or transfer rights contained in the other. This will be shown by a case formerly referred to in regard to consolidation of property and superiority by prescriptive possession of both on the superiority title exclusively.² And that rule is founded on the soundest principles of equity. When a party is served heir under a particular deed, he becomes liable for all that is imposed on him by such deed. But there may be other deeds, with the same destinations, containing obligations to which he does not choose to subject himself; and it would be unjust to hold him subjected to the obligations under any deed which he has not adopted, because of his assuming the character of heir under a different deed. The safe rule is to hold a party not to be connected with any deed containing a particular destination, until he has actually assumed the character of heir under that deed. There is only one exception to that rule, viz., the case of destinations to heirs-male general; which being a distinct class, the service as heir-male will connect the heir with all rights so destined, and subject him to the corresponding burdens, just as a service as nearest and lawful heir connects the heir with all rights destined to heirs whomsoever.³

SERVICE OF
HEIRS OF
PROVISION.

The rule, that the character of heirship must be expressly set forth, does not equally hold in the case of precepts or writs of *clare constat* from subject-superiors. These have never involved representation or liability beyond the value of the particular lands which they contain. They generally proceed on private knowledge, and are not *actus legitimi*; and it has been held enough if the precept is granted to the right heir, though he is not described as he ought to be in a service.⁴ The same principle was followed in the case of Ogilvy;⁵ but there the precept followed a charter of confirmation expressly confirming the writs containing the destination, and holding them as *verbatim* engrossed. That case, therefore, does not support any laxity of practice on this point; and unquestionably it is usual and proper to be as careful and accurate

¹ Woodmass, 28th Jan. 1825, 3 Sh. 476. A similar decision was pronounced in Colvin, 14th Dec. 1796, Hume, 723.

² Lord Elbank, 21st Nov. 1833, 12 Sh. 74. See particularly the opinions of Lords Balgray and Gillies.

³ Lord President Campbell in Cathcart's case, 24th Nov. 1807, 2 Ross's L. C. 535.

⁴ Durham's Trustees, 31st Jan. 1798, M. 15,118; Crichton's Creditors, 16th Jan. 1798, M. 15,115.

⁵ Ogilvy, 5th June 1817, Hume, 724.

in stating the heir's character in precepts or writs of *clare constat* as in services.

In the service of heirs of provision, or of tailzie and provision, the deed or deeds of provision founded on must be distinctly specified. This has, for a long time, been considered the rule; though in two cases¹ services as nearest and lawful heir of tailzie and provision were sustained, notwithstanding that the retours did not specify the deeds containing the destinations; and the report of Hay's case bears that, in Chancery, there were many retours of heirs of provision in which the deeds of provision were not set forth. But in these cases it appeared that the deeds, though not specified in the retour, had been produced or founded on at the time of the service; and the rule is now imperative, by the Services of Heirs Act, sect. 4, which requires that in all petitions for service of heirs of provision the deed or deeds of provision shall be distinctly specified. The same practice ought to be observed in the case of precepts or writs of *clare constat*.

**SERVICE UNDER
ENTAIL.**

When the service is under a deed of entail, the heir's character will be described as heir of tailzie and provision of the deceased under the deed of entail, which will be identified and described by naming its maker and giving its date, and the date of registration in the register of entails. It is unnecessary to insert the full destination, or the conditions of entail, or in general services even to refer to the conditions, in the way required in special services or in other feudalizing transmissions; but it is usual and proper to insert the destination down to and including the branch under which the petitioning heir is called. And in the special service, and generally in every proper feudalizing title completed by heirs of entail after the entail has been first feudalized, the rule is different. Prior to the passing of the Conveyancing Acts of 1847, it was necessary in each and every feudalizing title (including the retour of special service) to engross *verbatim* the whole destination with the whole conditions of the entail. The destination had to be engrossed in every feudalizing title *ad longum*, until the Titles Act of 1858 came into operation; since which date reference to the destination as contained in the recorded entail, or as set forth at full length in any writ in the progress recorded in the appropriate register of sasines, is sufficient.² With regard to the conditions of entail, there are different rules in different circumstances. If the entail has been recorded in the register of entails, it is enough in the heir's feudalizing titles to make a reference to the conditions as inserted in the recorded entail. If the entail has been feudalized by instrument of sasine, it is enough to make a similar reference to any recorded sasine forming part of the progress of title deeds under the entail. The form for such reference will be found in the note to schedule (B), annexed to the Services of Heirs Act, and in corresponding schedules annexed to the other Acts of 1847. There is no

¹ Forbes, 12th Aug. 1753, M. 14,431; and Hay, 30th June 1758, M. 14,389.

² Titles Act of 1858, s. 17.

express provision in the Titles Act of 1858, declaring reference to a recorded conveyance to be equivalent to reference to a recorded instrument of sasine; and sect. 1 does not operate to the effect of giving the recorded conveyance the same position, in this respect, as the conveyance with instrument of sasine recorded. It says that registration of the conveyance shall have the same effect as if the conveyance had been followed by instrument of sasine; but it does not say that the conveyance recorded is both a conveyance and an instrument of sasine. On the contrary, its object is to supersede the instrument of sasine; and as the Conveyancing Acts of 1847 expressly require reference to the conditions, as in the recorded entail, or a recorded instrument of sasine, it was necessary, notwithstanding the Act of 1858, where there was no recorded entail and no recorded instrument of sasine, that the feudalizing titles of the heirs should contain all the conditions of the entail *ad longum*. Now, by the Act of 1860, sect. 27, reference to the conditions as contained in any conveyance, instrument of sasine, or other writ, duly recorded in the appropriate register of sasines, is declared equally effectual with reference thereto as contained in an instrument of sasine. The case of the destination is different. The sections on that point¹ expressly allow reference to any recorded conveyance forming part of the title, and containing the full destination.

REFERENCE TO
CONDITIONS AND
DESTINATION.

If the entail has not been recorded in the Register of Entails, or if there is no instrument of sasine following upon or in terms of it, duly engrossing the conditions,—a point on which, before completing the new title, practitioners should satisfy themselves by comparison of the instrument of sasine with the entail,—then the conditions of the entail must be fully engrossed in the heir's feudalizing titles, just as before the passing of the Conveyancing Acts of 1847. In the case of new entails,—that is, entails executed after 1st August 1848,—in which the special clause of registration in the Register of Entails comes in place of the irritant and resolute clauses, or of the three leading prohibitions and the irritant and resolute clauses, it is necessary for the heir in his feudalizing titles to insert the registration clause, or a valid reference to it, just as the irritant and resolute clauses, or the above prohibitions and such irritant and resolute clauses, would have been inserted or referred to had these been in the entail.²

The Acts of 1858 and 1860, however, do not make provision for reference to the destination, and the conditions of entail, in the petition for a special service; and I apprehend that, when the title is to be completed by means of a special service, the provisions of the Acts of 1858 and 1860 will not be available. Neither will the Acts of 1847 be available when these Acts require reference to an instrument of sasine, and there is no instrument of sasine to refer to.

Another case in which an heir of entail may have to complete titles, and which appears to require a caution, is that of the special service as heir

¹ Acts of 1858, s. 17; 1860, s. 11.

² 11 & 12 Vict. c. 36, s. 39.

EXCAMBIONS. of the deceased in lands added to the entail by an excambion, in virtue of the Montgomery Act.¹ That Act declares, by sect. 33, that, upon the procedure therein set forth being duly followed out, the lands given in exchange to the entailed estate shall be held to be a part thereof, and shall be subject to all the prohibitory, irritant, and resolute clauses of the entail, in the same manner as if the lands had been originally a part of the estate. The lands brought under the entail are thus placed in the same position (as regards the fetters) as if they had been originally in the entail; and I apprehend that, in any special service and other titles applicable to such lands, the destination and conditions of the entail ought to be inserted or referred to, just as if the lands had been actually contained in the entail. I do not hold it enough to refer to the destination and conditions as these are noticed in the contract of excambion and sasine, even if sasine has followed thereon.

Real burdens in the ancestor's title must be inserted or referred to, on the same principles as those which are applicable to the conditions of entail in proper entail titles.

In the cases of provisional destination which we have been considering, the rule, that a service as heir of provision or of tailzie and provision is necessary, has always been clear and undoubted. But there are several classes of cases which present difficulties, and in regard to some of which the rules of law and practice are yet imperfect and unsatisfactory. The proper object of a service is to transmit a right from the dead to the living, or to form the warrant and authority for the investiture of the heir in a subject which was vested in his ancestor. For these purposes it is indispensable to find out in whom the subject was last vested in fee; as it is from that person, and from him only, that it must be transferred.

The cases I here refer to are those in which destinations occur in favour of parents in liferent, and their children in fee.

**LIFERENT
AND FEE.**

Where the destination is to the parent in liferent, and his children *nascituri*, or not named, in fee, the intention is held to be to give the parent the fee. He accordingly enjoys all the rights of a fiar during his life; and, on his death, his children make up titles to the lands destined as above, exactly as if the destination had been to the parent expressly in fee and not in liferent. The destination, apparently, is construed as in favour of the parent, and after his death to the children.

The above case, however, is to be distinguished from that of a proper liferent constituted by conveyance to one in liferent and to a *nominatim* fiar. Such right of liferent is a mere burden. The fee is in the *nominatim* fiar as institute or disponee; and there is no room for service in order to complete his title. There is no room to presume in that case that the intention was to give the fee to the party described as liferenter. The deed expresses the reverse; and there is no need of giving the liferenter a constructive fee in order to satisfy the feudal rules: he is therefore liferenter, and no more.² The distinction between these two cases is

¹ 10 George III. c. 51.

² Mackintosh, 28th Jan, 1812, F. C.

very clearly brought out by a case where there was a destination to A. LIFERENT AND FEE. B. in liferent, and to C. D. also in liferent, and the heirs procreated or to be procreated of C. D.'s body. In that case the liferent right of A. B. formed a mere burden. The right of C. D., though a nominal liferent, was a constructive fee in his person; and the heirs of the body of C. D. were not fiars, but only heirs of provision, and it was necessary for them to make up their titles as heirs.¹ Service to the proper liferenter in such cases would transmit nothing.²

Where, again, the destination is to the father in liferent, for his LIFERENT ALLENARLY. liferent use allenarly, and to the heirs of his body to be born in fee, the beneficial right of the father extends, as formerly explained,³ to the liferent only,—unless heirs of his body shall fail, and the destination is granted by himself. The feudal fee is in the father, as in the other case; but unless heirs of his body shall fail, and he has himself granted the destination, the father holds the fee not for himself, but as trustee for the heirs of his body, who will on his death make up titles as heirs of provision to him under the deed.⁴ And when the destination is as above, and the father has expedite infestment in favour of himself in liferent only, without noticing the right of fee at all, the eldest son will succeed as heir, and make up his title by service as heir of provision to his father; but the service will be general, and not special. The fee was conveyed by the disposition, and the father might have made his right thereto real, though only in trust for his children; in which case a special service, or precept, or writ, and registration thereof with warrant thereon, would have been required in favour of the heir. But the father's right under the disposition, in regard to the fee, was allowed to remain personal only,—the infestment in his favour extending merely to the liferent; therefore a general service only is required by the heir to take up the right under the disposition. In reference to this question I have to call your attention to a case, where there was a destination in an entail to a lady in liferent only, and her second son in fee; and the second son, though not born for two years after the entailor's death, was held not to be affected by fetters directed against his mother and the heirs substitute.⁵ It was there decided that the second son was the institute; though by the conception of the destination the fee would appear to be *in pende* between the death of the entailor and the second son's birth, unless by supposing a fiduciary fee to be in his mother, in virtue of the right of 'liferent only.' It was pleaded that a declarator, that the second son was the institute, would have been sufficient to make good his right to the procuratory and precept in the entail; and the Judges here had no doubt of his being disponent,—Lord Corehouse saying that his right as such vested *ipso jure*. I do not hold

¹ Lindsay, 9th December 1807, M. App. Fiar, No. 1.

² Dennistoun, 5th February 1824, 2 Sh. 678.

³ See *ante*, p. 782, *et seq.*

⁴ Duff, p. 447; Dundas, 23d Jan. 1823, 2 Sh. 145.

⁵ Logan, 20th Dec. 1836, 15 Sh. 291; affirmed 1st August 1839, Maclean and Robinson's App. 790.

that case as settling that for feudal purposes there was no fiduciary fee in the liferenter. It settled that, in a question with respect to the operation of the fetters of an entail, the party first called as the real fiar was not an heir; but I do not think it did more. I believe the practice in similar cases is to serve the real fiar heir of tailzie and provision to the fiduciary fiar.

Moreover, when the parent himself grants the destination in his own favour in liferent allenary, and to the heirs of his body in fee, whom failing, to his own heirs whatsoever, he does not divest himself of the fee in a question with his own heirs whatsoever. The heirs of his body, if they exist, will have the beneficial interest in the fee; but, supposing them to fail, he remains the fiar, and can alter the destination so as to exclude his own heirs whatsoever.¹

PREDECEASE OF
INSTITUTE.

The next case of peculiarity requiring notice is that where the granter of any testamentary or *mortis causa* deed disposes to a party who predeceases him, whom failing, to other parties. The practice, as regards cases of the above description, has varied at different times; and the rule to be observed cannot be regarded as yet finally and conclusively settled,—at least it has not been authoritatively placed on a satisfactory footing.

The alternative courses which were followed as applicable to such cases in older practice were—(1.) To expedite a general service, in favour of the party on whom the right first actually devolved, as heir of provision under the testamentary deed to the institute or first disponent under the deed; although such institute had predeceased the testator, and had never enjoyed any right under the deed; and (2.) To expedite service of the said party (on whom the right first actually devolved), as heir of provision under the deed to the testator himself.

With regard to the first of these courses,—that is, the service to the predeceasing institute,—it was long held that although the deed was undelivered, and revocable, and was in fact a legal nonentity until the death of the testator, yet as all dispositions of heritable estate in Scotland contained direct *de presenti* conveyances,—and in testamentary deeds there is a clause dispensing with delivery, and declaring the deed as good as if delivered,—there was a legal necessity for holding that such a right was in the party called as institute, as to require the party first taking under the deed, and called as substitute, to connect himself with the nominal institute by general service.

An opinion that such was the proper course was expressed by the Court in the first stage of the case of Colquhoun.² The eldest son of the testator was the party called as first disponent or institute in that case. He had predeceased the testator; and the next substitute was the person who actually succeeded on the testator's death. This substitute expedite a general service as heir of tailzie of the testator under the deed, and proceeded to feudalize the deed, as if he had thereby vested himself in

¹ Wilson, 4th Dec. 1827, 6 Sh. 198.

² Colquhoun, 16th Dec. 1828, 7 Sh. 200.

it, and had right to its executive and other clauses. The question was, whether the title, so completed, was valid; and whether the deed was thereby feudalized. Lord Balgray said, 'The eldest son was the disponee and institute; and therefore a personal fee was vested in him.' But the case was appealed, and remitted by the House of Lords,¹ with these questions for opinion of the Judges of the Court of Session,—(1.) Whether the service to the testator was valid? and (2.) Whether the service should have been to the testator's eldest son, the institute; or to any other and what person? On these questions the Court gave their opinion,²—(1.) That the service as heir to the testator was inept to take up the procuratory or precept granted by the testator in favour of his eldest son and other heirs;—there was nothing vested in the testator by such procuratory or precept, or which could be taken out of him and transferred to another by such service; and (2.) That where the institute in such a deed predeceases the testator no right has vested in him, and the party on whom the right actually devolves is not a proper substitute heir, but conditional institute or disponee,—the condition attached to his right being the predecease of the institute before the testator; and that the conditional institute should establish his right by bringing a declarator in the Court of Session, that the condition originally attached to his right had been purified by the predecease of the institute, and that he was now the institute and disponee, and, as such, entitled to take up the procuratory and precept in the deed.

The course here pointed out had been taken in an earlier case;³ and the principle of these decisions appears to be this:—The maker of the deed has disposed the lands from himself to some one else. The question is,—To whom has he disposed them? Who is the disponee under the disposition? The decree of declarator answers that question, and supplies the disponee. But it was enough for the decision of the point at issue in Colquhoun's case to find that the service to the maker of the entail was inept. The question, whether service to the predeceasing institute ought to have been expedite, did not affect the result of the case before the Court; and in a subsequent case,⁴ exactly similar to Colquhoun's, countenance was given to the plan of serving to the predeceasing institute. That, however, was an amicable suit, raised merely for the sake of direction. And when the question came next before the Court, the circumstances were again such as to render unnecessary the decision of the abstract question, whether there should be service to the predeceasing institute or not. In the case now referred to, there was a direct disposition by a testamentary and undelivered deed to A. and the heirs of his body; whom failing, to B. and the heirs of her body; whom failing, to C. and the heirs of her body. A. and B. predeceased the maker of the deed without leaving issue; and C. was served heir of provision to A., that is, to

¹ 17th Feb. 1831, 5 Wil. & Sh. App.
32.

² 8th July 1831, 9 Sh. 911.

³ Mackenzie, 24th Nov. 1818, F. C.

⁴ Murray, 21st May 1833, 11 Sh.
629.

the predeceasing institute. In these circumstances, four Judges (the Lord Justice-General Boyle, the Lord Justice-Clerk Hope, and Lords Medwyn and Meadowbank) held that service to the predeceasing institute was the proper course to be taken, and that the personal right under the deed vested in C. as heir substitute duly served. Six Judges (Lords Moncreiff, Cockburn, Mackenzie, Gillies, Fullerton, and Cuninghame) held that C. was conditional institute, and that the personal right under the deed vested in her as such without service. But, in either view, C. had a good title : and the Court held unanimously that the personal right under the deed had vested in C., and that she had made up a valid title ; because, if she was a proper substitute, her service to A. was the proper step for taking up the disposition in her favour ; and if she was a conditional institute she was donee, and no service was necessary. The Court at the same time expressed a unanimous opinion that, supposing C. to be a conditional institute, a declarator of her right was not required to authorize her using the procuratory or precept ; and that, as soon as the condition was really and truly purified, she might feudalize the disposition, just as any donee would have done whose right was unconditional from the first.¹ But the abstract question, as to the mode of making up titles in such cases, is not settled, and is expressly shown to be open, both in what passed in the Court here and in the Court of Appeal in Fogo's case. The course of absolute safety, therefore, in similar cases, is to make up the title in such a way as to be unexceptionable in either alternative—of service to the predeceasing institute being necessary, or of its being not so. There is no need, however, of a declarator for that purpose.

A more intricate title may become necessary under a destination similar to that in Fogo's case, with a slight change of circumstances. In Fogo's case, both the institute and first substitute—say A. and B.—predeceased the testator ; and C., the next substitute, then served to A. But supposing that A. only predeceased, that B. survived, but died without making up any title, and that the estate then devolved upon C.,—C. would still have to be served heir-substitute of provision to A., on the alternative view supported by four Judges in Fogo's case. But he would not himself be conditional institute, on the alternative view which was supported by the six Judges. B. is supposed to have survived : B. thus became conditional institute, according to the latter alternative ; and C. would have to be served heir of provision not only to A., to meet the first alternative view, but likewise to B. ; because, according to the other alternative view, the right vested in B. by his survivance ; and, if it so vested, it must be transferred from B. by service to him.

Another case of practical difficulty is that of a disposition in favour of the heirs of the testator's body who never exist ; whom failing, to A. and the heirs of his body, etc. Under such a destination A. is either conditional institute or a substitute. It appears quite clear that if in Fogo's case the party who first took under the deed was conditional in-

¹ Fogo, 11th March 1842, 4 D. 1063 ; affirmed 18th Aug. 1843, 2 Bell's App. 195.

stitute, though called as a substitute, the same principle ought to apply here,—making A. conditional institute. But we have decisions on the subject adverse to the view that A. can, in such circumstances, take as conditional institute.¹ And in Fogo's case the Lord Justice-Clerk Hope, when speaking of Carleton's case, said he held A. (that is, the disponee called after the heirs of the testator's body) to be a substitute, requiring a service as heir of provision to the testator in order to give him a vested right under the deed. In such case, therefore, the safe course appears to be to serve A. as heir of provision to the testator under the deed. It does appear, at the same time, that there are strong grounds for holding that A. is truly conditional institute, and that nothing can be transferred from the testator to him as heir under the deed, because the testator has conveyed nothing to himself by the deed. He has disposed the lands from himself to some other party by the deed; and what appears to be wanted is competent proof of the party to whom he has so disposed the lands. In this view, the service as heir of provision to the testator under the deed, though it transfers nothing from the testator to the party served, nevertheless supplies the proof that he is disponee. The other alternative is that A. is a substitute heir. In that case the same service will transfer the right under the deed to him,—making the case practically the same as Fogo's; and the service will thus make the right of A. clear and complete in either alternative.

These cases, however, are to be contrasted with those in which the testator grants the disposition in favour of himself as institute; whom failing, to A. and his heirs; whom failing, etc. When the disposition is to A., who predeceases, the argument in favour of the subsequent disponee being conditional institute is, that no right had vested in A., because the deed was not delivered during his life; that A. therefore never acquired any connexion with the deed. Neither had the testator, in that case, any personal right under the deed. He was not the disponee under the deed. But, in the case now supposed, the testator is the disponee. The deed, being in his own favour, requires no delivery, or rather is delivered as soon as it is executed. He has thus a complete personal right under it; and whoever is to take under the deed must transfer to himself that personal right. For that purpose, his course (and his only course) is to expedite service as heir of provision to the testator under the deed. A title made up by infeftment of the first heir-substitute, without previous service to the testator, the institute, would be inept.² And the case is the same where the destination is to the testator, and to A. B. his son, without the words 'whom failing.' The testator is institute; and his son is heir-substitute, and must be served.³

DISPOSITION
BY TESTATOR
TO HIMSELF
AS INSTITUTE.

Carleton's Case, 8th Feb. 1748, M. 14,366; affirmed 11th March 1765, 2 Paton's App.

¹ Carleton, 8th Feb. 1748, M. 14,366; Peacock, 22d June 1826, 4 Sh. 742.

affirmed 11th March 1765, 2 Paton's App. 108.

² Hamilton, 10th June 1714, M. 14,360; Livingstone, 9th March 1757, M. 15,409;

³ Gordon, 24th Feb. 1791, Bell's 8vo Cases, 180.

The course in such cases is clear of all difficulty; for which reason you may again be reminded of the recommendation formerly given, to make the testator himself the donee or institute in such deeds as we are now considering.

**SUBSTITUTIONS
OF TRUSTEES.**

We occasionally find trust-rights with substitutions of trustees,—for example, destinations to A. in trust for creditors, or for other purposes; whom failing, to B., in trust for the same purposes. In these cases, supposing A. to die, and B. to accept the trust (which he may or may not do in his option), he will make up titles as heir of provision to A. in trust under the trust-deed. Again, if there is a destination to A. and his heirs in trust, the heir, if he accepts the trust, will make up his title as heir of the institute in trust conform to the deed. There being here no special destination, it is doubtful whether the service should be as heir of provision, or simply as heir in trust. As the heir would have no right to take unless there were a destination, it may be safest to hold that the service should be as heir of provision. There can be no doubt of the validity of a service in that character in such case. The case is different if there is no destination in the trust-right to heirs, or if the heirs who are called decline to accept, or are minors, or incapacitated, and cannot accept;—in any of these circumstances, the parties upon whom the right to the lands devolves must, as formerly explained, make up titles by the form of a declarator of their right, and adjudication.¹

These cases, however, are to be distinguished from trust-rights granted to several trustees and the survivors and survivor of them. On the death of one or more trustees under such a disposition, the survivors or survivor have in them the full right, by the quality of the original grant, and without service or any new title. Nor is any service or other title necessary in favour of a trustee whose right arises under a conveyance to him and others jointly,—with a declaration that, of the trustees named, one shall have the exclusive right to act in the first place; another after the death or resignation or incapacity of the first; and so forth. There is here no proper substitution of one to another: in a feudal sense, all are equally institutes or direct donees, subject only to a qualification affecting their right of acting in the trust.

I may notice here, that although a proper substitute may have been, in point of form, registered or infeft along with the institute,—that is, by registration or sasine in favour of the one, whom failing, the other,—the registration or sasine of the institute has exhausted the precept or warrant, and, by giving the full fee to the institute, has left nothing to be taken by the substitute, except in the character of heir of provision to the institute, and by means of a regular title in that character.²

**BIRTH OF
NEARER HEIR
AFTER SERVICE.**

It has been seen that the party to whom service must be expedite as heir is the party in whom the fee was last vested; and the heir entitled to be served is the nearest heir at the time of the service, supposing

¹ See *ante*, pp. 929, 932.

² Ker, 12th Feb. 1708, M. 14,357.

always that no nearer heir is then *in utero*.¹ If, however, the destination be tailzied, the right of any heir, than whom a nearer heir may possibly exist, is only qualified; and if, subsequently, a nearer heir shall exist, the more remote heir of tailzie or provision, though previously served as nearest for the time, must divest himself in favour of the nearest heir afterwards existing, so as to give effect to the provision of the tailzie.² The nearer heir of tailzie will have right to the rents from his birth. But onerous *bond fide* contractions with the heir of tailzie who ultimately denudes, which have been entered into during the possession of such heir, are effectual against the nearer heir of tailzie afterwards existing,—as, for example, a *bond fide* sale to a third party, or the jointure to a wife granted by an antenuptial contract of marriage;³—unless the qualified and contingent nature of the title of the heir who was bound to denude appears on the face of the title, in which case the purchaser cannot plead *bona fides*, and the sale will not stand.⁴ In such case, Lord Deas thought the denuding heir was to be regarded as possessing only on appearance, though he had been infeft as heir. But, if the succession be simply in virtue of the destination of law, the nearest heir in existence at the time of the service can obtain an indefeasible title; and if he completes such title before a nearer heir is born, or *in utero*, he will be under no obligation to denude in favour of such nearer heir afterwards existing. In the case of Grant,⁵ a father had succeeded and made up titles as heir of his only child; subsequently another child, not then *in utero*, was born; and the gratuitous disponees of the father were found to have an indefeasible right notwithstanding. It is of course necessary that the titles of the heir nearest for the time shall be completed before the nearer heir exists or is *in utero*; otherwise the claim which belongs to the nearest heir for the time will be excluded.

Where the ancestor was infeft or registered, a special service as heir LAPSED
SPECIAL
SERVICE. to him is merely a step towards a title to the lands contained in it. If not followed by infeftment or registration, it falls to the ground as a title to such lands; and the next heir will expedite a service, just as if the lapsed special service had never been expedite. But where the ancestor had only a personal right a general service as heir to him in the proper character is more than a step towards a title: it is a title. It is a judicial act, which transfers the personal right to the heir who has been served; and it is thereafter incompetent for another to serve heir to the same individual and in the same character. Thus, if a son has been served heir to his father, and, after the son's death, his son, that is the grandson, has to take up a personal right under a disposition to the grandfather, the grandson must serve to his own father, not to his grandfather. The service, already expedite by his own father, has trans-

¹ Stair, iii. 5. 50; Lord Mountstewart, 13th Nov. 1707, M. 14,903.

² Mackinnon, 16th June 1756, M. 14,938; Stewart, 2d Dec. 1859, 22 D. 72.

³ Macdonald, 15th Feb. 1765, M. 5290;

affirmed 25th Feb. 1771, 2 Paton's App. 252.

⁴ Stewart's case.

⁵ Grant, 2d Dec. 1859, 22 D. 53.

GENERAL SERVICE IMPLIED.

ferred the right from the grandfather to the heir's own father; and therefore it is from his own father that it must be transferred by service.¹ Great care is therefore necessary in expediting services to remote ancestors. And here it is necessary to keep in mind, that under our older law—that is, until the passing of the Services Act of 1847—a special service as heir of any party, or as heir of provision to any party, included in it a general service in the same character to the same party; so that, in cases where general service only is required, it is necessary to inquire not only whether there has been any previous general service, but also, until the Services Act came into operation, whether there has been any special service to the party to whom a petitioner is about to serve as heir in general.² The Services Act, sect. 23, declares a special service to imply a general service only as to the property which is embraced in the special service. A general service, therefore, may now competently be expedite as heir to a party, notwithstanding the previous special service of an intermediate predecessor as heir to the same party and in the same character; provided the previous special service has been expedite since the above Act came into operation.

COMPETING SERVICES.

But where a service about to be expedite is intended to establish a right preferable to that of a person already served, there may be a second service to the same party. The object in such case is not to transfer from the party already served what has been already validly transferred to such party, but to reduce the title of the party already served.³ And, generally, when one is to oppose a service, he must present a competing petition. It is not enough that he alleges an interest to oppose. He must claim to be the heir who is entitled to serve.⁴ And here I may point out that an intending competitor, by lodging a *caveat* with the clerks of Chancery, or of the Sheriff-Court, is entitled to receive notice of the petition for service with which he is to compete when lodged, and may then present a petition, to be proceeded with in the same way with the petition first lodged, in which first petition the Sheriff may sist procedure that the proof and judgment in both may proceed together.⁵ But, if a party prefers to have his case tried by a jury, he may advocate for that purpose before the evidence begins; and after the verdict the Court remit to the Sheriff to give judgment in terms of it.⁶ The Sheriff's judgment may also be advocated for review within a short fixed time; and it may be brought under review likewise by reduction.⁷ But, as already observed, the Court of Session cannot serve an heir: that is the function of the Sheriff. If the Court are of opinion that the Sheriff has done wrong, their course is to ordain him to do what they decide to be right.

I have noticed that the expediting of a service infers a certain respon-

¹ See on this point *Cochrane*, as reversed 29th April 1830, 4 Wil. & Sh. App. 128; and *Wilson*, 11th Feb. 1851, 13 D. 636.

² *Duff*, p. 469.

³ *Macara*, 15th Feb. 1848, 10 D. 707.

⁴ *Graham*, 23d November 1850, 13 D. 125.

⁵ 10 & 11 Vict. c. 47, s. 8.

⁶ *Ibid.* s. 17.

⁷ *Ibid.* s. 16.

sibility against the party served for the debts and obligations of the ancestor. And when the service is such as will take up the *universitas* of a succession,—for example, as heir of line, or of conquest, in general,—universal liability for the debts and obligations of the deceased follows as matter of course, even if the estate taken up is greatly less in value than the amount of the debts, or indeed although no estate be taken up at all. The old law provided a remedy against liability beyond the value of the estate, by enabling the heir, within year and day after his ancestor's death, and previously to being served, to give up and record an inventory of the ancestor's estate.¹ It was indispensable, however, that the inventory should be given up before the service; otherwise liability was incurred.² The details which the Act of 1695 requires to be observed are numerous; and the Act may be regarded as now superseded; the Services of Heirs Act of 1847 having provided a much simpler form producing the same effect.³ It is thereby declared lawful for an heir, in petitioning for general service, to state in his petition, in the form of schedule (D) annexed to the Act, that he desires the effect of his service to be limited to the particular lands contained in a specification annexed to the petition. The specification so annexed is to be subscribed by the party or his mandatory. The decree of service will thereupon be limited in its effect to the lands specified, and the heir's liability to the value of these lands. The general service under the old form, which was called a service *cum beneficio inventarii*, gave right to all the lands which the deceased held on personal titles. But the modern general service with specification annexed will give right only to the lands in the specification; and, if the deceased was infert in these lands, the general service must be followed by a special service, or precept, or writ, for taking the lands out of the estate of the deceased and vesting them in the heir.

LIABILITY
INCURRED BY
SERVICE.

SERVICE *cum*
beneficio inven-
tarii.

The Act of 1847 made a further alteration as regards the liability incurred by a special service. Formerly a special service without inventory inferred universal liability. Such service now infers liability only to the extent of the value of the lands contained in it.

Before leaving the subject of services, I have to notice the Act of 1617, cap. 13, introducing a twenty years' prescription as to services; which term being expired, reckoning from the date of the service, it is incompetent for any one to reduce the retour or decree on the ground that the party served was not the nearest heir.⁴ And the prescription is available to heirs of provision as well as heirs of line.⁵ This Act does not interfere with the Act 1617, cap. 12, introducing the forty years' prescription applicable to land-rights generally. The Act regarding retours applies simply to the proof of the relationship, and to questions

PRESCRIPTION.

¹ 1695, c. 24.

² Codrington, 11th Feb. 1818, F. C.; affirmed 31st March 1824, 2 Sh. App. 118.

³ 10 & 11 Vict. c. 47, s. 25.

⁴ Neilson, 17th Jan. 1837, 15 Sh. 365; affirmed 19th March 1840, 1 Robinson's App. 82.

⁵ Campbell, 26th January 1848, 10 D. 461.

between competing heirs. After twenty years a competing heir cannot raise a reduction of his competitor's service. But at any time within forty years a third party may raise a reduction of the service and whole other titles on any relevant ground. The distinction between the rules applicable to the two cases respectively will be found stated with great clearness in the opinions of the Judges in Scotland, and of the Lord Chancellor, in Neilson's case.

I should also remind you that when service is to be expedite to an ancestor, between whom and the petitioner there are one or more connecting links, these ought all to be specified in detail¹ Thus, a petitioner, who is cousin-german of the deceased, ought to say,—‘That I am ‘eldest son of A., who was the immediate younger brother of B, who ‘was father of the said deceased C.’

TENTATIVE
TITLE BY TRUST-
BOND AND AD-
JUDICATION.

I have now to explain the nature of the title which may be made up by an heir by means of a trust-bond granted to a friend, and adjudication following thereon. This kind of title is founded on the principle introduced by the Acts 1540, cap. 106, and 1621, cap. 27,—by the former of which it was declared that, when a debtor's heir failed to enter to his ancestor for year and day after his ancestor's death, it should be competent to the creditor of the ancestor to charge the heir to enter, and, failing his entering, to apprise the lands as effectually as if the heir had entered, subject always to redemption within seven years. The latter Act extended the same privilege to the creditor of the heir on account of the heir's own debt. This title proceeds upon a bond granted by the heir in favour of a friend, for an imaginary debt, equal to or exceeding the value of the estate; the creditor, on the other hand, granting a back-bond acknowledging that he holds the money-bond in trust for behoof of the heir. The creditor, having thus an *ex facie* claim of debt, adjudges the lands in terms of the Statutes, just as if he were truly a creditor of the heir. He thereupon feudalizes his decree of adjudication by charter and sasine or registration; and denudes of the right thus acquired, by a conveyance in favour of the heir in terms of the obligation undertaken by the back-bond. The title thus made up is usually called a *tentative* title, because of the objects in view in establishing it.

The object of proceeding in this way is to enable the heir, whilst avoiding the responsibility attaching to service as heir, to try the validity of some competing title in a third party; and it has been long practised for that purpose, and is recognised as a competent form of title in an heir's person by the Act 1695, cap. 24.

Contrary to the general rule, that where the rights of the debtor and creditor concur the debt is extinguished *confusione*, the adjudication or trust-bond,—even when conveyed by the trustee to the truster, making him both debtor and creditor,—is not only an active-title, to the effect of enabling the heir to challenge competing rights to the lands, but it is a

¹ Earl of Cassillis, 22d July 1629, M. 14,423.

valid feudal title, which transmits to his own heirs.¹ Neither does the fictitious nature of the transaction afford any good objection to the title at the instance of a third party. If it turns out that the competing party has a preferable claim to the lands, the adjudication will be reduced and go for nothing. If the heir's right, on the other hand, is sustained, he has made up a title under which he can validly make a *mortis causâ* conveyance of the estate,—which without service or other title he could not do.²

This form of title can be resorted to also, so as to validate gratuitous deeds, where the proceedings in an attempted service are suspended by action in Court or appeal to the House of Lords.³ When, however, a party, after obtaining a personal title by trust-bond and adjudication, reduced a competing claim, and acquired a real right in virtue of a conveyance from his ancestor's trustees, the completion of the real right was held to infer the abandonment of the personal title; and a gratuitous settlement by the heir of the party was found ineffectual, as being granted by one who had not himself a title.⁴

Moreover, it is not competent for an heir to make up a tentative title by means of an absolute disposition of the lands, and adjudication following thereon. The trust-bond, though admitted in our law, is an anomaly; and the law will not allow any other form for the like object.⁵ And here I may notice an opinion, that adjudication on trust-bond is incompetent where the service of the heir who grants the bond is excluded by the prior service of another party, as heir to the same ancestor, and in the same character;—for this reason, that the adjudication proceeds on a charge against the heir to serve himself in the character in question, and he cannot be charged to perform what is incompetent.⁶

The only other form of deed applicable to the entry of heirs is the Instrument of Cognition and Sasine of burgage property. That deed combines in one the service, precept of *clare constat*, and instrument of sasine. Until the passing of the Sasines Act,⁷ the form was this:—A claim, in the character of heir to the deceased in the particular property, was presented to the bailies of the burgh. One of the bailies thereupon proceeded to the subjects, accompanied by the claimant or his procurator and the town-clerk. The bailie examined on oath two or more witnesses then present in regard to the propinquity of the heir; and, if satisfied on that point, granted immediate entry and investiture to the heir, by giving him or his procurator earth and stone of the ground, and the

¹ Hepburn, 25th July 1781, M. 14,487; Beveridge, 10th July 1793, M. 5296.

² Beveridge's case.

³ Craigie, 19th Jan. 1808. M. App. Adjudication No. 16.

⁴ Bellenden, 6th June 1823, 2 Sh. 369;

affirmed with amendments, 17th June 1857, 1 Wil. & Sh. App. 381.

⁵ Dunlop, 31st March 1824, 2 Sh. App. 115.

⁶ Lord Moncreiff in Rutherford, 12th Nov. 1830, 9 Sh. 3.

⁷ 8 & 9 Vict. c. 35.

hasp and staple of the door of the principal dwelling-house. The heir thereupon assumed actual possession, after the old Roman form, by entering the house and shutting the door.¹ He then came out and took instruments in the hands of the town-clerk as notary, calling the attention of the witnesses to the fact.

This procedure was set forth in an instrument of cognition and sasine made out by the town-clerk, being a notary,—narrating the appearance of the heir or his procurator on the ground, in presence of the bailie and witnesses, the production of the deceased's infestment, and proof of the heir's propinquity; and that the bailie thereupon served and cognosced the claimant heir, and gave him delivery of the lands by hasp and staple, and with earth and stone. This instrument afforded complete evidence in itself of the heir's propinquity, entry, and infestment. When cognition and sasine is resorted to, the forms in use are the same as before; except that, by the Infestments Act of 1845,² the long docquet of the notary is dispensed with, and the delivery of symbols may lawfully be given either on the ground of the lands as formerly, or within the Council Chamber, in which case the delivery of a pen is enough. The place where the cognition is to take place, regarding which the Act says nothing, usually is the Council Chamber. Service and entry *more burgi* are expressly excepted from the operation of the Services of Heirs Act.³ It will be observed, however, that in this case the instrumentary witnesses attest the facts set forth, and must sign each page of the instrument; and the instrument must be recorded in the Burgh Register of Sasines within sixty days of its date, under pain of nullity.⁴

WRIT OF *clare constat* IN BURGAGE LANDS.

Now, by the Titles Act of 1860, sect. 7, it is competent for the magistrates to grant a writ of *clare constat* in favour of the heir of a person infest in burgage lands; or such heir may expedite a special service before the Sheriff, in the same way as in the case of feudal holdings. When such writ, or the decree of special service, is recorded in the Burgh Register of Sasines, with warrant of registration thereon, the heir's title is complete.

ANCESTOR NOT INFEST.

The above are the rules when the ancestor was infest. Where he had only a personal right, the heir must expedite a general service for connecting himself with the procuratory in the disposition to the ancestor; just as he would do with reference to the procuratory and precept in a disposition of feudal subjects. The power of the bailies to give infestment to heirs, without a regular retour or decree of service, is confined to cases in which the ancestor died infest; and objections to an infestment, which was given to the heir of one who had only a personal right, were sustained.⁵ The heir, after obtaining retour or decree of general

¹ Duff, p. 515; Menzies, p. 838.

² 8 & 9 Vict. c. 35, s. 7.

³ 10 & 11 Vict. c. 47, s. 26.

⁴ 1681, c. 11.

⁵ Cuming, 4th Dec. 1783, M. 14,446.

See also Houston, 4th February 1784, M. 14,420.

service, will either expedite an instrument of resignation and sasine in his favour, in the usual form of such writs, except that the service will be narrated as giving him right to the procuratory; or, under the Titles Act of 1860, sect. 10, he will expedite a notarial instrument, and record it, with or without the disposition containing the procuratory of resignation, according as the instrument shall or shall not fully narrate the disposition.¹

The same care must be taken in burgage entries as in others, that the party claiming is described in his proper character, as heir of conquest, heir of provision under a particular deed, etc.

We have an early case in which the entry of an heir in burgage subjects by precept of *clare constat* was sustained,² but in circumstances which do not appear to give the case weight as a precedent. And before the Act of 1860 came into operation that form of entry is understood to have been unknown in practice, in reference to lands held by burgage tenure. On the other hand, when the magistrates have granted a feu-right, the entry of heirs will be by precept or writ of *clare constat*, as in an ordinary case of superior and vassal. But, when that relation has been constituted, the sasine, or precept, or writ, must be recorded in the General or Particular Register of Sasines, and not in the Burgh Register of Sasines, even though the lands lie within the burgh territory.³ The case of Dixon,⁴ where it was found that the sasine of lands, disposed by magistrates to be held feu, fell to be recorded in the Burgh Register, is not to be relied on.⁵

In lands held burgage, there is no relief or other casualty exigible by law; though frequently a fine is chargeable by express stipulation, on granting an entry to an heir. The lands are not in non-entry, and are not relieved out of the hands of the superior;—the community, which never dies, being the vassal. But, of course, when the holding is feu, the usual casualties applicable to such holdings are due, if they have not been renounced.

CHAPTER III.

I now take up the subject of Confirmation,—or the completion of an executor's title to the moveable estate of a person deceased.

CONFIRMATION
OF EXECUTORS.

Upon the decease of any person, his proper moveable or personal estate devolves upon his heirs in moveables, whose right may arise under a testamentary deed by the deceased, or as his next of kin. The estate is at once at the free disposal of the heirs, either for onerous causes or

¹ 23 & 24 Vict. c. 143, schedules (G) and (B).

² Lockhart, July 1662, 1 Br. Sup. 482.

³ Davie, 2d June 1814, F. C.

⁴ Dixon, 1st Feb. 1823, 2 Sh. 176.

⁵ Bell's Principles, 847.

CONFIRMATION
OF EXECUTORS.

gratuitously; but, subject to a few exceptions to be afterwards noticed, the heirs have no active title to the estate until they have been judicially confirmed executors of the deceased. I propose—(1.) to consider the nature and effects of the process of confirmation of executors, and the equivalent to confirmation introduced by the Confirmation and Probate Act of 1858;¹ and (2.) to notice those cases in which a complete active title to moveable estate which belonged to a person deceased arises to his heirs in moveables without confirmation or its equivalent.

Confirmation is a decree or sentence of the Judge in the Commissary Court (named the Commissary) in favour of the party who has been named by the deceased, or decreed by the Commissary himself to be executor to the deceased, confirming the executor or his nomination, and giving him power to uplift, administer, and dispose of the proper moveable estate of the deceased, contained in an inventory or schedule given up by the executor upon oath, or affirmation, as afterwards explained. Confirmation operates as a completed assignation. Where the deceased was domiciled in Scotland at the time of his death, the inventory may now (in virtue of the Act of 1858) contain moveable estate of the deceased situated in England or Ireland, as well as in Scotland; but, so far as it relates to estate situated in England or Ireland, certain steps must be taken, after the confirmation is obtained, for completing the active title of the executor. I will advert to these as we proceed, and also to the enactments of 1860-61, which require inventories to include, so as to infer liability to inventory stamp-duty, estate not strictly belonging to the deceased, and money due to the deceased secured on heritable property, or contained in personal bonds secluding executors.

COMMISSARY
COURTS.

The power of granting confirmations to executors anciently belonged to the Bishops' Courts, which were abolished at the Reformation. The Commissaries had formerly acted as the Bishops' vicars, or deputies, in these Courts; and, shortly after the abolition of Episcopacy, the Commissary Courts were established in the place of the Bishops'. Each Commissary had a district placed under his jurisdiction, called a commissariat. The older commissariats,—and the Commissary as a separate legal functionary,—were abolished by the Act 4 Geo. IV. cap. 97, by which, and by a subsequent Act,² every sheriffdom and stewartry in Scotland constitutes a commissariat, (except that two sheriffdoms, when under the jurisdiction of one Sheriff, constitute one commissariat). And every Sheriff is now the Commissary of his county. Where, therefore, the deceased had his only or principal domicile in Scotland at the time of his death, confirmation must be obtained from the Sheriff, as Commissary of the commissariat—that is, the county—of such domicile. When the deceased had his domicile out of Scotland, the confirmation must be obtained from the Commissary of Edinburgh, as the *commune forum* for all foreign parts. And Edinburgh is also the *forum* for obtaining confirmation to any person who had no fixed or known domicile at the time

¹ 21 & 22 Vict. c. 56.² 11 Geo. IV. and 1 Will. IV. c. 69, s. 30.

of his death. There is not in any case of confirmation, as in cases of the completion of an heir's title by service, the option of applying to the Commissary of Edinburgh or to the local Commissary.

When the deceased has named his executor, application for confir- EXECUTOR-
NOMINATE. mation of the executor-nominate may be made to the Commissary at once, and as matter of course; and confirmation will be granted, even if the deed of settlement, containing the applicant's appointment, is at the time under challenge with a view to reduction.¹ The nomination cannot be refused effect until the deed is actually reduced. But where no executor-nominate applies for confirmation, the Commissary will appoint or *give* an executor,—called in this case an executor-dative. DATIVE. The appointment of the executor-dative, however, is not made in favour of any one as matter of course. The office of executor-dative is conferred only where no one applies to be confirmed as executor-nominate; and the Commissary has, in general, no means of knowing whether an executor-nominate will apply. Moreover, the appointment of executor-dative is not made *primo venienti*. It is conferred on persons having beneficial interests in the estate, or connected with the deceased by marriage or by blood relationship, according to an established order which I will afterwards explain. When, therefore, application is made for the appointment of an executor-dative, measures are taken, having for their object to publish the application, in order that any party interested may have an opportunity of appearing and objecting to the proposed appointment. For this purpose we formerly had a writ called an 'edict of executry,' issued in name of the Commissary, at the instance of the party claiming to be appointed. This edict contained warrant, when the deceased had his only or principal domicile in Scotland, to summon all and sundry, by affixing a copy of citation on the kirk door of the parish of such domicile, on a Sunday before the dismissal of the congregation from the forenoon service, and also on the market-cross of the head burgh of the county of the domicile, to compare before the Commissary, at the end of nine days, to hear and see executors decerned to the deceased. When the deceased was domiciled abroad, or had no fixed or known domicile, the edict was served at Edinburgh edictally, like other edictal citations, agreeably to the Acts 6 Geo. IV. cap. 120, sect. 51, and 1 & 2 Vict. cap. 114; and a copy was put upon the church door of St. Giles, as the metropolitan church. But application by edict ceased in all cases as on 12th November 1858, and, in place thereof, the applicant for the office of executor-dative now presents a petition to the Commissary from whom confirmation can competently be obtained, stating that the deceased died at a place, and on or about a day, specified; and that he had his ordinary or principal domicile in a certain county, or furth of Scotland, or that he was without any fixed domicile, or without any known domicile, as the case may be. The petition then states the ground on which the applicant rests his claim, which may be (*inter alia*) interest in the

¹ *Grahame*, 28th Feb. 1822, 1 Sh. 362.

estate as general disponent, or relationship as next-of-kin, and concludes with a prayer to the Commissary to decern him executor-dative of the deceased *quid* general disponent or next-of-kin, or as the case may be. It is signed by the petitioner or his agent.

This form is as nearly as possible the same as that of the petition of an heir for general service. The old mode of publication, in the case of the edict, has been abolished; and the publication of the petition for confirmation is made as nearly as possible similar to that of the petition for the service of an heir. A full copy of the petition is to be affixed on the door of the Commissary Court-house, or in some conspicuous place of the Court, and of the office of the Commissary-clerk; and the particulars of the application are to be inserted by the Keeper of the Record of Edictal Citations at Edinburgh in a book to be kept for the purpose, and to be published weekly with the abstracts of petitions for services. The Commissary-clerk is to furnish these particulars to the Keeper of the Record of Edictal Citations, who again is to report their publication; and the clerk is then to certify on the petition that the same has been intimated and published.

On expiration of nine days after the Commissary-clerk's certificate of publication, the petition may be called in Court, and an executor-dative decerned; or other procedure may take place, according to the forms in use at the date of the Act in the case of edicts, and with the like force and effect. But, as decernitures are to proceed on petitions only, it would seem that the old form in cases of competition—of preferring A. B. on the edict issued at the instance of C. D.; or, where there are two applicants, of conjoining A. B. with C. D. in the office on such edict—cannot be adopted. A. B., in order to be preferred to the office, ought to present a separate petition to the Commissary for appointment, just as if he were the only applicant. A petition for conjunction with another applicant will be slightly different in its terms. Decree-dative may be extracted on the expiration of three lawful days after it has been pronounced, but not sooner. As soon as the decree-dative is extracted, there is an executor in this case, equally as when the deceased himself made a nomination.

The forms with a view to confirmation vary slightly in the case of the executors-nominate and executors-dative respectively.

The executor-nominate produces to the Commissary the deed whereby he has been appointed, and every other testamentary deed or writing executed by the deceased relative to the disposal of his moveable estate, or any part thereof, or probative extracts of these deeds. The executor-dative produces his extracted decree-dative, or refers to it as in the records of the Court. He likewise produces testamentary deeds and writings by the deceased, if any, equally with the executor-nominate. They both produce also an inventory or schedule of the deceased's whole proper moveable estate; and, for the purpose of the Stamp Acts, and as regulating the inventory stamp-duty to be paid, such inventory will

include moveable estate which any person, dying on or after 3d April 1860 (the date of the Act to be immediately noticed), shall have disposed of by will, under any 'power from a third party to dispose of the same as he shall think fit.'¹ It will also, for the purposes of the Stamp Acts, include money due to the deceased secured on heritable property, or contained in bonds secluding executors; or, as to such last-mentioned estate, there may be a special inventory, as more fully afterwards explained.

INVENTORY
OF PERSONAL
ESTATE.

If the deceased had no personal estate situated in England or Ireland, or if he had personal estate in either of these countries, and if he was domiciled in Scotland, the executor may or may not avail himself of the option given by the Act of 1858, of including such English or Irish estate in the confirmation. If he is not to avail himself of such option, the inventory will simply distinguish what estate is situated in Scotland from what is elsewhere, and will be written on the stamp applicable to the Scotch estate only; a title in the case supposed being wanted to nothing more.

The executor, at the same time that he produces the inventory of estate and testamentary writings, if any, as above, must make oath or affirmation that the inventory contains a full and true statement of all the deceased's personal estate, wherever situated, so far as the same has come to his knowledge, and that the deceased executed no deed relative to the disposal of the estate, or of any part thereof, other than the deed or deeds, if any, produced. This oath or affirmation must be taken or made in presence of the Commissary or his depute, or the Commissary-clerk or his depute, or before any commissioner to be appointed by the Commissary, or before any Magistrate or Justice of the Peace within the United Kingdom or Colonies, or any British Consul.²

OATH TO
INVENTORY.

The testamentary papers, if any, with the inventory and oath or affirmation, are then recorded in the Court-books, and a testament-testamentar, or confirmation of the executor-nominate, or a testament-dative, or confirmation of the executor given by the Court, as the case may be, is issued, authenticated by the seal of Court and the clerk's subscription; the executor-dative in the first place finding caution for his intromissions, which, since the passing of the Act 4 Geo. IV. cap. 97, is not required on the part of executors-nominate. Forms of these confirmations are given in schedules (D) and (E) annexed to the Act of 1858. They recite the death of the deceased at a place and on a day specified; his nomination of an executor, or the Commissary's appointment, as the case may be; the giving up of the inventory, stating whether the estate was situated in Scotland alone, or in Scotland and England or Ireland; the amount of the estate; and that the inventory has been recorded in the Commissary-Court books; and, in the case of the executor-dative, they recite also the finding of caution. The testament-testamentar then confirms the nomination of the executor, and commits to him the intromission with the moveable estate contained in the inventory; not

TESTAMENT-
TESTAMENTAR.

¹ 23 & 24 Vict. c. 15, s. 4.

² 21 & 22 Vict. c. 56, s. 11.

including what is situated in England or Ireland, as, in the case supposed, the inventory does not properly include such estate, though it specifies it as distinguished from the estate in Scotland. The Commissary gives the executor full power to uplift and discharge the moveable estate contained in the inventory; if needful to pursue actions, and, generally, to do all that is known to belong to the office of executor-nominate. The testament-dative constitutes and confirms the executor with the above powers. And both provide that the executor shall render just count and reckoning of his intromissions when and where he shall be legally required. The powers they confer bear a strong resemblance to those expressed in an ordinary assignation of debt or personal estate.

The distinctions between the cases of the executor-nominate and the executor-dative are—(1.) that in the case of the executor-dative an appointment by the Commissary is required, which is conferred after publication of the application for the appointment in case no preferable competitor appears. Where there is an executor-nominate, the Commissary makes no appointment, the deceased having done so himself. And (2.) the executor-dative has to find caution, before confirmation, for his intromissions, to such extent, not exceeding the amount of the inventory of estate, as the Commissary shall fix. If the original cautioner shall die, the executor may be compelled to find new caution.¹ The usual course is to make the caution equal to the inventory; but on special application, with cause shown, and after public advertisement, the Commissaries are authorized to restrict the caution to a smaller amount. The cautioner is not liable in any case *ultra vires inventarii*.²

Confirmed testaments, in the forms authorized by the Act of 1858, are thereby declared (sect. 10) to have the same force and effect with the like writs framed in terms of the Act of Sederunt of 20th December 1823 as to the Commissary-Court of Edinburgh, and the Act of Sederunt of 25th February 1824 as to the other Commissary-Courts in Scotland, or in the forms in use at the date of the Act of 1858.

The above procedure relates to confirmations when the deceased's whole moveable estate was situated in Scotland, or where, the deceased having had such estate situated in England or Ireland, or both, as well as in Scotland, and being domiciled in Scotland at the time of his death, the executor does not wish to avail himself of the option given by the Act of including in the inventory the English or Irish along with the Scotch estate of the deceased. But if a person so domiciled had personal estate in England or Ireland, as well as in Scotland, an active title to what is situated in England or Ireland can, in the executor's option, be obtained by proceedings of a very simple nature for supplementing the confirmation, which of itself constitutes such title to the Scotch estate only.³ In such cases, the person applying for confirmation must, in the

ENGLISH AND
IRISH ESTATE.

¹ Menzies, 9th Dec. 1709, M. 3834.

² Murdoch, 17th Feb. 1826, 4 Sh. 479.

³ Act of 1858, §. 9.

first place, satisfy the Commissary, and the Commissary must pronounce an interlocutor, finding that the deceased died domiciled in Scotland; which interlocutor is declared to be conclusive evidence of the fact of the domicile, but (sect. 17) for the purposes of the Act only.

Moreover, the inventory must include (in the proper sense of the term, and not merely by specifying and distinguishing it) the whole moveable or personal estate of the deceased situated in the United Kingdom; the value of the estate situated in England or Ireland respectively must be stated separately; and the inventory is chargeable with the stamp-duty corresponding to the value of the entire estate, wherever situated within the United Kingdom. For the purposes of the Stamp Acts, as already noticed, the inventory must include all personal estate disposed of by the deceased by will, in virtue of powers from third parties to dispose thereof as he shall think fit.

In order to make the confirmation available as an active title to personal estate situated in England or Ireland (a most important privilege conferred by the Act of 1858), it is only further necessary to produce the confirmation in the Principal Court of Probate in England, or in the Court of Probate in Dublin, and to deposit a copy thereof with the registrar, accompanied by a certified copy of the interlocutor finding that the deceased died domiciled in Scotland, and to get the confirmation sealed with the seal of such English or Irish Court. Thereafter the confirmation so sealed has the like force and effect in England or Ireland as if probate or letters of administration, as the case may be, had been granted by said respective Courts of Probate. Sects. 12 and 13.

By sect. 14, corresponding privileges are conferred with reference to grants of probate or letters of administration from the Courts of Probate in England or Ireland, as applicable to Scotch estate belonging to parties who shall have died domiciled in England or Ireland. The domicile is to be proved by a note or memorandum written thereon, signed by the proper officer. The probate or letters of administration must be produced in the Commissary-Court of Edinburgh, and a copy deposited with the Commissary-clerk, who is to indorse or write on the back or face of the grant a certificate that the same has been produced, and a copy deposited with him. The probate or letters of administration are thereupon (being duly stamped) to be of the like force in regard to moveable estate situated in Scotland, as if a confirmation had been granted by the Commissary of Edinburgh. In such cases, the probate or letters of administration are to be considered as granted for the whole personal estate of the deceased situated in the United Kingdom; and the affidavit as to the value of the estate is to include the whole estate so situated, and specify the value of the Scotch estate separately; and the probate or letters of administration are to be stamped as for the whole estate.

For the protection of parties transacting *bonâ fide* in reliance on any instrument purporting to be a confirmation or probate or letters of administration, supplemented as aforesaid,—that is, having the seal or

ENGLISH AND
IRISH ESTATE.

certificate, giving efficacy to the instrument with reference to property situated out of the proper jurisdiction of the Court by which the principal instrument is issued,—the Act 22 Vict. cap. 30, declares that all such persons shall be indemnified and protected, notwithstanding any defect or circumstance affecting the validity of the confirmation, probate, or letters of administration.

**INVENTORY
STAMP.**

The inventory, whether in the case of an executor-nominate or dative, is given up on an *ad valorem* stamp. The amount of the duty is regulated by the Acts 55 Geo. III. cap. 184, schedule, Part iii., and 22 & 23 Vict. cap. 36, sect. 1, and where there is no deed disposing of the moveable estate, or any part thereof, is one-half more than where there is such deed. And, by the Acts 23 & 24 Vict. cap. 15, sect. 6, and cap. 80, sects. 1 and 8, money secured on heritable property in Scotland, including money so secured by conveyance *ex facie* absolute, and by adjudication when the right of reversion has not expired, also money contained in Scotch bonds and other instruments, which (or the rights to which) exclude executors, and constituting the succession, or part of the succession, of any person who shall have died on or after 3d April 1860, which is the date of the first of these Acts, are, for the purposes of the Acts, declared moveable property, and appointed to be included in the inventory to be given up by the executor in the Commissary-Court, or in a special inventory to be given up by the person in right of such moneys so secured. This enactment, however, you will observe, does not make the moneys in question moveable property to all intents and purposes, but only for the purposes of the Acts,—that is, with reference to the liability to stamp-duties. And the Act does not apply to feu-duties and other permanent periodical payments, which are made a real burden upon land, where payment of a capital sum of money is not thereby secured.

The amount of the inventory-duty, with interest at five per cent. from the expiry of six months after the death of the deceased, is declared a debt due to the Crown, payable by the person who shall take the money so secured, whether such person has a beneficial interest therein, or is only a trustee or liferenter. And in giving up the special inventory, or other inventory, the property is to be sworn, and duty paid according to the value thereof, at the date when the inventory is given up, not, as formerly, at the date of the death of the deceased; and it is to include the proceeds accrued down to the date of giving up.

**RETURN OF
DUTY.**

The stamp-duty upon inventories corresponds to the gross amount of the personal estate, including as aforesaid, without any deduction on account of the debts due by the deceased at the time of his death. But where debts due by the deceased are actually paid out of his estate, other than voluntary debts payable only on the death of the deceased, or under any instrument which shall not have been *bonâ fide* delivered to the donee thereof three months before the death of such person, the Acts allow the proportional return of stamp-duty corresponding to the amount

of such debts so due and paid, other than as aforesaid;—that is, the Acts provide for the reduction of the duty to the amount corresponding to the net value of the estate, inclusive of the amount of such voluntary debts;—if such return of duty is claimed within three years from the time of recording the confirmation, and if the debts, for which allowance is claimable, be actually paid before the return is allowed. It is not enough that such debts be due. Formerly allowance was made even for voluntary debts; but this is now withdrawn as to any person dying after 28th June 1861.¹

If the estate cannot be realized within the above period of three years, so as to admit of the debts authorizing the allowance being paid, the time to apply for the return of duty can be extended by the Commissioners of the Inland Revenue, on application for that purpose.² The debts, in respect of which the return of the inventory-duty is to be allowed, must not only be paid, but payable by law out of the moveable or personal estate of the deceased. Where, however, the deceased owed heritable debts exceeding the value of his heritable estate, the balance of the heritable debts, after deducting the price or value of the heritable estate, becomes a debt payable by law out of the moveable estate, and payment of such balance will authorize a claim for return of inventory-duty. In like manner, where the personal estate is exhausted by personal debts, and consequently debts due only on personal securities become chargeable on the heritable estate, return will be allowed of a portion of the inventory-duty paid in respect of the money secured on heritable property.³

Moreover, where estate is given up in the inventory at an over-value, and too much duty is paid on that account, a return of the excess of duty can be obtained in this way:—A new inventory can be given up and recorded, containing the estate at its true value, and on the corresponding stamp; and, that being done, the original stamp will be got back on special application. There will be no new confirmation. The whole estate has been already confirmed; and it was not under but over valued. OVER-VALUED
ESTATE.

If the inventory is not given up within six months after the deceased's death, penalties are exigible, in addition to the interest on the stamp-duty now chargeable by the Act of 1860.

The Act 4 Geo. IV. cap. 98, sect. 3, declares it lawful to eik to any confirmation estate afterwards discovered; and, should any additional estate of the deceased be discovered after the inventory has been given up, and confirmation obtained, such estate must be set forth in an additional inventory, which must be lodged with the Commissary within two months after the discovery, accompanied by an oath, stating the discovery, and that nothing else has been discovered. EIK TO CON-
FIRMATION.

The obligation to set forth 'additional estate' afterwards discovered seems also to extend to additional or improved value arising upon the

¹ 24 & 25 Vict. c. 92, s. 3.

² 55 Geo. III. c. 184. s. 51.

³ 23 & 24 Vict. c. 80, ss. 4 & 6.

estate, or some item of it, as originally given up in the inventory and confirmed. For fixing the amount of the inventory-duty, it is often necessary to put a value upon some particular item of the deceased's estate; and, where such value can only be estimated, it must frequently be under-stated. If an item of the estate, though under-valued, be actually reduced into possession by the executor in virtue of his confirmation, his title will be good, notwithstanding that the stamp-duty corresponding to the sum by which the value has been under-estimated shall be unpaid. But, if such item be not reduced into possession, it seems doubtful whether the executor has right to insist on obtaining possession of it, except to the extent of the sum or value at which it has been stated in the confirmation. It seems doubtful whether such estate, to the extent of the additional value thereof, is not *in bonis defuncti* until transferred to the executor by an eik, following upon an additional inventory accompanied by an oath, exactly as in the case of estate altogether omitted in the original inventory and confirmation. In fact it appears to be held that the under-statement, in the confirmation, of the value of a portion of the deceased's estate is, to the extent of the sum under-stated, an omission of estate belonging to the deceased, and requiring to be taken out of his *hæreditas* by confirmation, equally with some separate portion of the deceased's estate wholly unnoticed in, and omitted from, the inventory and confirmation.¹

Apparently the Court of Probate will not allow its seal to be affixed to an eik or additional confirmation. If the original confirmation does not include the whole of the deceased's personal estate in England, the proper course is said to be to obtain a new confirmation.² An additional inventory with a view to an eik formerly had to be on the full stamp corresponding to the original and additional inventories, just as if no stamp-duty had at first been paid; but it is now enough that the stamp-duty paid on the original and additional inventory be of the amount corresponding to the total estate.³ And if the total estate, original and additional, would not have required a larger stamp than that originally paid, the additional inventory may be given up on unstamped paper. I may here notice that there is no progressive stamp-duty on inventories in any case. After using the proper *ad valorem* stamp, any schedules or additional matter may be written on plain paper. And no duty is exigible on the inventory of the estate of any soldier, seaman, or mariner, slain or dying in the service of his country.

Where additional estate is given up and confirmed, the confirmation is technically called '*ad omisssa*,' or '*ad omisssa et male appretiata*.' Where the application for the confirmation is made by the original executor, the procedure is the same as on his original confirmation. But application for confirmation *ad omisssa* or *ad omisssa et male appre-*

EXEMPTION
FROM DUTY.

ESTATE
OMITTED OR
UNDER-VALUED.

¹ Smith & Others, 27th June 1862, 24 D. 1142.

² English case of Hutcheson, noticed in

the Journal of Jurisprudence for 1864, vol. viii. p. 55.

³ 16 & 17 Vict. c. 59, s. 8.

tiata may be made by any person having interest ; in which case a petition will be presented, and other procedure will be followed out, similar to that explained as relative to the appointment of an executor-dative, with this variation, that the petition, besides being intimated and published as in such cases, must be intimated to the executor already confirmed, as he may be interested in opposing it.¹ And, practically, the result will in general be that the original executor will confirm *ad omissa et male appretiata*. If there is a separate executor *ad omissa et male appretiata*, he will have to give up inventory, make oath, and expedite confirmation just as the principal executor ; and he will also have to find caution, which would not be incumbent on the principal executor if nominate.

With regard to confirmation *ad male appretiata*, it has been argued, and on plausible grounds, that, though additional stamp-duty is clearly due, supplementary confirmation is not required where the executor is appointed for the general behoof, and is not an executor-creditor. Where an item of estate is left out of the inventory, the executor can claim no real right in such item in virtue of his confirmation, which goes no further than the inventory. In such cases confirmation *ad omissa* is clearly competent and necessary. But, in cases where there is only an under-valuation, the original inventory specifies the estate or item under-valued, in the same words as if the full value were put upon it. It has, therefore, been doubted whether, in this last case, supplementary confirmation is necessary, or even competent, and whether it is necessary to do more than pay the additional stamp-duty. This point was discussed in the case of Smith, before cited ; and it seems to have been the opinion of the Court that supplementary confirmation was necessary for conferring on the executor, even when acting for the general behoof, a real right in the under-stated portion of articles *male appretiata*, in the same way as in the whole of articles *omissa*.

Though the executor be a pupil or minor, the title by confirmation ought to be made up in his own name, provided he has a tutor or curator ; the tutor, of course, taking the oath in the case of a pupil, and the curator concurring in the oath in the case of a minor.² Where the pupil or minor has no tutors or curators, it is usual to carry through the proceedings in the name of a factor appointed by the Commissary. In Edinburgh, the appointment of the factor takes place at the outset ; and he is both decerned and confirmed executor *quod* factor.³ But it is competent, in the first place, to obtain decree-dative in favour of the pupil or minor as executor, and thereafter to expedite the confirmation in favour of the factor, who, in either case, is specially authorized to give up the inventories, and to confirm in his own name as executor *quod*

PUPIL AND
MINOR
EXECUTOR.
FACTOR.

¹ Erskine, iii. 9. 37.

² Fraser, ii. 118, and authorities cited.

³ A form of the petition applicable to

this case will be found in Alexander's Practice of the Commissary Courts, p. 193.

EXECUTOR
ABROAD.

factor.¹ In these cases the Commissary grants the confirmation to the factor with power of intromission, subject to the obligation to account. The factor must find caution. A confirmation in these terms was found to give a good title to the minor herself, after choosing curators, to sue for a debt contained in the inventory; the factor, and likewise her curators, concurring in the claim and discharge.² In Johnstone's case, the Lord President Hope remarked that, when the executor was abroad, it was competent for one holding his factory to expedite confirmation in his own favour *quod* factor,—an arrangement which may in some cases be convenient. It would be necessary for the factor to hold special powers; though, perhaps, power in express words 'to expedite confirmation' may not be indispensable.

JUDICIAL
FACTOR.

Judicial factors on the estates of persons deceased are entitled to be decerned and confirmed executors-dative to them, *quod* factors.³ They will adopt the same procedure as in the case of executors-dative, and must find caution.

COMPETITION
FOR OFFICE OF
EXECUTOR.

Supposing no executor-nominate to apply for confirmation, and that a competition for the office shall arise between two or more petitioners, the Commissaries are directed to give the preference in the following order; viz,—

1. The deceased's general disponee or universal legatory.
2. His nearest of kin.
3. His widow.
4. His creditors.
5. His legatees.
6. Judicial factors.

As regards the first, the general disponee is the party chiefly interested. The general disposition to him, in fact, is held to import the exclusion of the next-of-kin from the office.⁴

In the case of the next-of-kin, it will be recollected that the Movable Succession Act⁵ gives to the issue of a predeceasing child or brother of the deceased the same beneficial right which their parent would have enjoyed if he had survived. But the Act reserves the office of executor *quod* next-of-kin to the survivors who are nearest in degree, excluding from the office the children of those deceased, who, however, will be appointed on their application, if those having the prior right do not compete for the office.

It appears, however, that where the deceased died without issue, leaving a father, as well as brother or sister; or, if predeceased by his father, leaving a mother, as well as brother or sister; the father or the mother will, in such case, have right to be dealt with as among the next-of-kin, and to be decerned and confirmed as such along with the brother

¹ Johnstone, 15th Feb. 1838, 16 Sh. 541.

² *Ibid.*

³ Act of Sederunt, 13th Feb. 1730.

⁴ Earl of Crawford, 10th Jan. 1755, M. 3818; see also M'Gown, 4th Dec. 1835, 14 Sh. 105.

⁵ 18 & 19 Vict. c. 23.

or sister.¹ And, independently of the Act of 1858, the parties entitled to the office of executor appear to be the next-of-kin having right to such office by the law of the country in which the deceased was domiciled at the time of his death ;—not those who would have had such right if the deceased had been domiciled in Scotland. Thus, where the deceased was domiciled in England, his mother, as the person entitled to the office by the law of England, was preferred to the office of executor-dative in Scotland.²

The effect of confirmation requires a brief notice.

When the whole prescribed steps have been duly taken, the legal effects of confirmation are to vest the estate contained in the inventory and confirmation fully in the executor, and to give him a complete active title to such estate. The mere nomination of an executor of the deceased, or the decree of the Commissary in favour of an executor-dative, gives a title to pursue ; but debtors and others are not bound to pay until the executor has perfected his title by confirmation ; and accordingly it is usual, when a suit is raised by one not having confirmed, and decree is pronounced in his favour, to insert in the interlocutor a provision for confirmation being produced before extract ;—in other words, before the decree can be made the groundwork of any proceedings, the title of the party must be made complete. And it is not expedient for a debtor to pay a debt to the executor before confirmation. It is no doubt safe to pay to the executor nominated by the last or ruling testament of the deceased ; because such executor is the proper person to deal with. And the executor-nominate, when he is also general donee of the deceased, can, though unconfirmed, not only discharge a debt due to the deceased, but transmit the same, or other moveable estate of the deceased, to his own general donee and executor.³ But the deed of nomination founded on by the party claiming as executor may have been revoked ; and a debtor who pays to one who claims to have right, but has only an imperfect title, does so at his own risk, and cannot plead that he acted *in bonâ fide*.⁴

LEGAL EFFECT
OF CONFIRMATION.

The risk of paying without requiring confirmation in the case of one claiming as next-of-kin is even greater. Formerly, no right vested in the next-of-kin of the deceased without confirmation. And, if the next-of-kin died before expediting confirmation, payment to them would go for nothing. But, by the Act 4 Geo. IV. cap. 98, sect. 1, the right of the next-of-kin so dying transmits to his representatives, who may obtain confirmation in the same manner as confirmation might have been granted to the next-of-kin themselves immediately on the death of the intestate.

¹ Alexander's Practice, p. 43.

² *Ibid.* p. 44 ; Hastings, 10th Feb. 1852, 24 Jurist, 231.

³ Robertson, 25th Jan. 1828, 6 Sh. 446.

⁴ The general rule, and the risks applicable to such cases, are exemplified in

the case of Taylor, 9th June 1827, 5 Sh. 785 ; reversed and remitted for an issue in the Jury-Court, 14th Dec. 1830, 4 Wil. and Sh. App. 444 ; and finally decided in favour of the debtor who had made the payment, 6th Jan. 1834, 12 Sh. 564 and 403.

If, therefore, the next-of-kin who claim are the parties really in right of the debt, their discharge will be effectual, though they shall happen to die without expediting confirmation. They have also right to grant an assignation of estate, fallen to them as next-of-kin, which will effectually transmit such estate to the assignee.¹ And the right of the next-of-kin, though unconfirmed, is liable to be attached by arrestment at the instance of their creditors.² But a debtor paying to a party who claims as next-of-kin of the deceased, and is unconfirmed, exposes himself to the risk of there being more next-of-kin in the same degree, or an executor-nominate, or a general disponee, or other third party equally or preferably entitled. Of the danger arising from such contingencies as these a striking example will be found in a case where a debtor paid to the next-of-kin, duly decerned as executor, a debt of £1000, of which confirmation had been expedite to the extent of only £20. By-and-bye the will of the deceased was discovered, under which the next-of-kin had only a liferent right;—and the debtor had to pay £980 a second time to the fiars under the will.³

**DOUBTFUL
CLAIMS.**

Confirmation has often to be expedite when claims on the part of the deceased are of doubtful value, or wholly disputed. In these cases it is proper and necessary to include the debt or claim in the inventory and confirmation, valuing it at what it may be expected to realize, or noticing the claim in the inventory, and stating that, if recovered, additional duty will be paid, and an eik made to the inventory and confirmation. The confirmation obtained in such cases is a good title to sue; and, if the debt or claim is duly confirmed, though under-valued, it has been held that the executor, on obtaining decree, is entitled to charge for the full amount, notwithstanding the inadequacy of the value stated, and of the stamp.⁴ In *Williamson's case*, a disputed claim was given up by an executor-creditor as 'sum supposed to be due,' etc., concluding with the words 'no value can be put upon it,' and it was held that the confirmation which was expedite on the inventory so made up gave a good title to sue; and that it would be sufficient to add the amount to the inventory when the debt was constituted by decree in the process at the instance of the executor claimant, against the alleged debtor, before extracting decree in the process. In that way, the executor's title would be fully completed, and security given by him for the full amount of the inventory, before he was entitled to make an active use of his decree and diligence.

Sometimes a debt has been paid to the deceased, of which he was bound to grant; but had not granted, an assignation before his death. In these cases it appears very doubtful if the deceased's executor can include the debt, which is not an outstanding asset, in his confirmation;

¹ Mann, 9th Feb. 1830, 8 Sh. 468. See in particular Lord Corehouse's note, p. 470.

² Frith, 3d March 1837, 15 Sh. 729.

³ Buchanan, 30th Nov. 1842, 5 D. 211.

⁴ Brown, 16th Dec. 1853, 16 D. 225. See also *Williamson*, 13th Nov. 1832, 11 Sh. 7.

but after obtaining confirmation, with the power or license from the Commissary to pursue for debts, he can competently grant such an assignation as the deceased was bound to grant, which will effectually transmit his title to pursue and enable the assignee to sue for the debt.¹

The executor, after confirmation,—and whether nominate or dative,—EXECUTOR IS TRUSTEE FOR ALL CONCERNED. is vested with the character of trustee for all concerned in the succession; and he is accountable as such;—a rule which applies equally to the executor-creditor, as to any excess beyond the amount of his own debt, when he confirms more than enough to pay his debt. And as by confirmation the executor excludes all others from intromitting with the estate of the deceased, properly contained in the confirmation, he is himself bound to use care and diligence in the discharge of his office, and to proceed with execution against debtors, wherever there would otherwise be danger of loss to the estate. You will find some instructive remarks as to an executor's liability in the case of Pearson.² You may also be referred to another case, where, under circumstances of admitted hardship, an executor-dative was found personally liable for the sum in a bill due to the estate, in respect of not having done due diligence for recovery.³

Moreover, where two or more next-of-kin are confirmed as executors-dative, it seems to be held that they form a species of society; and that one or more of them will be liable, though they afterwards acquire an English domicile, to be prosecuted in the Scotch Courts for debts affecting them as executors.⁴

The office of executor is personal, like that of trustee. Erskine⁵ says DEATH OF EXECUTOR. that, on the death of an executor, the right to execute the testament, so far as unexecuted by the deceased executor, is transmitted to his executor. But I apprehend that this statement has reference to the case of an executor who is also general donee, or residuary legatee, of the deceased, and beneficially interested in the estate,—to one in fact who holds the office of executor not as a mere trust for others, but for his own behoof. When the executor is to uplift and realize the estate, and apply it for behoof of, or convey it to, third parties, the office does not transmit to his representatives upon his death. If he has expedite confirmation, but has not actually realized the funds, a title must be made up to such funds by an executor *ad non executa*.

It may be that a succession of executors has been named by the deceased. It is not competent to obtain confirmation in favour of persons to act as executors in succession to each other; but the next substitute can, upon the death of the original executor, be confirmed executor *ad non executa*, and so on until the whole estate is reduced into possession. If there has been no appointment of executors to act in succession, the office of executor-dative *ad non executa* may be obtained by the next-of-kin of the deceased,—that is, of the person whose estate is to be adminis-

¹ Magistrates of Wick, 11th Dec. 1849, 12 D. 299.

² Pearson, 19th Nov. 1824, 4 Sh. 206.

³ Forman, 2d Feb. 1853, 15 D. 362.

⁴ Magistrates of Wick, *supra*.

⁵ Erskine, iii. 9. 38.

tered,—on application to the Commissary Court; or the judicial factor on an estate vested in trustees and executors who have all died after confirmation, but before realizing the whole of the deceased's moveable estate, can be appointed executor-dative *ad non executa*, *quid* factor.

In order to obtain confirmation *ad non executa*, the applicant, if not the substitute nominee, must be decerned executor, as in the ordinary case of an executor-dative. The nominee requires no such decerniture. The applicant when named, or after being decerned, presents a petition to the Commissary Court, setting forth, *inter alia*, the death of the executor previously confirmed leaving part of the executry funds unuplifted, and exhibits an inventory of such funds, along with a relative affidavit, as in the ordinary case; but the inventory will be confined to the estate of the deceased which was unuplifted or unrealized by the former executor or executors. Confirmation follows as matter of course; the executor-dative finding caution.

If, however, the former executor or executors had actually recovered the estate, the succeeding executor cannot obtain a title by confirmation to the deceased. The term '*ad non executa*' does not refer to the fulfilment of the purposes of the executorship or trust generally. It has reference to the question whether the funds or estate have or have not been reduced into actual possession. For example, the sum in a bond to the deceased, though contained in the first executor's confirmation, may be still outstanding. To the extent of such sum, confirmation *ad non executa* is competent. So far as regards funds actually realized by the first executor, and reduced by him into possession, the testament is held to have been duly executed by him. It will be necessary, or at all events it is competent, in reference to such last-mentioned funds, for the party entitled to such funds, or to the administration thereof, to establish a title by declaratory adjudication, as formerly explained in reference to the case of a lapsed trust.¹

**EXECUTOR-
CREDITOR.**

The case of executors-creditors will now be noticed.

Here, and here only, there may be partial confirmation. Executors-creditors no doubt must, like other executors, give up the whole estate in their inventory, and pay corresponding stamp-duty; but by 4 Geo. IV. cap. 98, sect. 4, they may limit their confirmation, and consequent responsibility, as well as the amount of the caution to be found by them, to the amount of the debt due to them, or of the sum confirmed by them, to which the creditor must make oath. Their true position, indeed, is that of creditors attaching, by what may be called the appropriate diligence of confirmation, a portion of their debtor's estate, out of which to recover the debt due to themselves.

The applicant in this case must present a petition, as in other cases of executry-dative; and notice of the application has to be inserted in the Edinburgh Gazette at least once, immediately after the application is made; in evidence of which a copy of the Gazette containing the

¹ See *ante*, pp. 932, 933.

notice has to be produced in Court before further procedure in the confirmation. After expiry of the nine days' notice, and when the Gazette notice has been given and proved, and supposing no one to object, or to petition to be conjoined with the applicant, decree and confirmed testament-dative will issue in favour of the applicant as executor-creditor; he finding caution to the extent of the sum or value of the estate which he confirms: but it is open in this case, as in others, to apply for restriction of the amount of the caution.

But not only is the next-of-kin, or any one else having the preferable right to the office of executor, entitled, on petition, to exclude the creditor-applicant; but another creditor, who cannot find other funds open to his diligence, is entitled to be conjoined with the applicant, to the effect of participating in the estate to be confirmed.¹ Formerly conjoining could take place under the edict published at the instance of the first applicant. Now I apprehend that any one desirous of being conjoined must petition for appointment.² And further, by the Act of Sederunt of 28th February 1662, reviving one of Cromwell's Acts, all creditors of persons deceased, using legal diligence within six months after the deceased's death, *inter alia* by citation of persons who have already completed their diligence as executors-creditors of the deceased, are entitled to come in *pari passu* with such persons as claimants on the fund confirmed by them; the posterior creditors always bearing a share of the expense incurred by the executor-creditor first confirmed.³

It is necessary, however, that the debt on which application for confirmation as executor-creditor is founded shall be duly constituted. The deceased's bond or bill, or the like, is a sufficient constitution. When the debt has not been constituted against the deceased, an action of constitution ought to be brought by the creditor against the deceased's executor confirmed, if there is one. If there is no executor already confirmed, then, by the Act 1695, cap. 41, the creditor is entitled to charge the next-of-kin of the deceased to confirm themselves executors to him within twenty days. This proceeding constitutes a passive title against the person charged, unless he renounce the succession; in which case the charger may proceed to have his debt constituted, and the *hæreditas jacens* of moveables declared liable, by a decree *cognitionis causâ*.

The *hæreditas jacens* is the estate which was vested in the deceased, and which has not been transferred in a competent manner to his heir. The heir, when he has got the estate transferred to him, is liable to be pursued, and to have decree pronounced against him, decerning him personally to pay, or as the case may be. When he has not taken up the estate, and has renounced to be heir, the creditor cannot obtain a decree against him inferring personal liability. On the contrary, the renouncing heir is entitled to be assoilzied as far as he is personally concerned. The creditor will still obtain decree; but, after the re-

¹ Lee, 17th May 1816, F. C.

² See Alexander, p. 203.

³ See also Macdowal, 19th Feb. 1742, M. 3936.

nunciation to be heir is lodged in process, the decree will be '*cognitionis causâ tantum*,'—that is, for the sake of constituting the debt. On obtaining such decree, the creditor can apply by petition to be confirmed.

The Act of 1695, cap. 41, likewise provides the mode of proceeding where the debt, in respect of which confirmation is wanted, is due by the deceased's heir, and the creditor wishes to attach moveable estate of the deceased to which the heir has succeeded, but as to which he has not obtained possession, or has not made up his title. In such case the creditors can either require the Procurator-Fiscal to confirm and assign the estate to them, or they can obtain themselves decerned executors-dative to the deceased as if they were creditors to him. But the creditors of the deceased himself, doing diligence to affect the estate within year and day of the deceased's death, are always to be preferred to the diligence of the creditors of the heir.

And here I think it proper to notice the views expressed by Lord Curriehill in the case of Smith, before cited, as to the competency of several, and even of successive, confirmations by different creditors of a party deceased, all applicable to the same subject or article of estate. The case before the Court was one of competition between two confirmations in favour of executors-creditors,—the one expedite some years before the other. Each confirmed a right of succession belonging to the deceased, describing it in the inventory and confirmation as the whole and entire right; but in the first it was estimated as of the value of £4850; in the second, as of the additional value of £18,000,—making a total of £22,850. The whole was claimed as falling under the first confirmation in virtue of the description given therein. The value was under-estimated; but that, it was said, was only a question for the Stamp Office,—at least it could be corrected by a supplementary confirmation. On the other hand, it was contended that the first confirmation gave no preference except to the extent of £4850; that after allowing or deducting that sum, the second confirmation conferred a preference on the balance to the extent of £18,000. This latter view was sustained; and what Lord Curriehill said was as follows:¹—'I think the effect of this (the first) confirmation was only to create a burden or *nexus* upon the subject confirmed; and that subject was left in the *hæreditas jacens* of the defunct debtor subject to that burden. I think that is the true legal effect of such a diligence. And accordingly there may be fifty confirmations as executors-creditors of the same fund, each of them creating merely a burden to the extent of the debt. In this respect, I do not see that there is any difference between diligence after the death of a debtor as to his moveable estate, from what it is as to his heritable estate. Take the case that an estate is heritable: a creditor brings an action of constitution against his debtor's heir, who is unentered; the heir, on being charged to enter, gives in a renuncia-

¹ 24 D. 1169.

'tion, and a decree *cognitionis causâ* is pronounced, and on that decree the creditor attaches the heritable estate by adjudication. He attaches the whole estate by general adjudication; but, though the whole estate is attached, the adjudication merely operates as a burden on it and as a *nexus*. Another creditor comes, and goes through the same process and adjudges for his debt,—and so there may be a dozen of these; but all the while the estate is left in the *hereditas jacens* of the defunct, subject to the burden of these steps of diligence; and, if the heir wishes to make up his title after all, he must do it by service and entry with the superior in the usual way. I think the proceedings by diligence of the creditors of the defunct against his moveables are of the same legal character, in this respect, that the diligence of each of them merely creates a burden or a *nexus* upon the estate, and that it is always subject to be attached by other parties under the burden of the debts so created upon it.'

I now notice those cases in which confirmation is unnecessary for the completion of the successor's title, or is excluded. WHERE
CONFIRMATION
UNNECESSARY.

1. The executor, or next-of-kin, or other representative, who obtains actual possession of the fund or estate, needs no confirmation by way of title thereto.¹

2. Nor is confirmation required as to a debt which the debtor is willing to pay or deliver without the completion of a title by confirmation. Thus, a bond of corroboration obtained by the next-of-kin supersedes the necessity of confirmation in their favour as regards the debt corroborated.² I have already adverted to the risks affecting the debtor when he voluntarily transacts before the executor's title is complete; and these are applicable to his granting a bond of corroboration, and thereafter paying, or even becoming liable to pay, to the executor unconfirmed as the creditor therein acknowledged, equally as to his making payment to an executor unconfirmed, and to whom he has not granted bond of corroboration.

3. I have stated that the title under a confirmation is like that under a completed assignation. And a special assignation or disposition made by the deceased is declared by the Act 1690, cap. 26, to be a good and valid title to possess, pursue, and defend the subject assigned without confirmation, though not intimated or published during the deceased's lifetime. The assignation, however, being merely a private right, must be intimated after the deceased's death, in order to the completion of the assignee's title. This Act of Parliament is construed as giving to special legacies the same position in this respect as special assignations. Where the deceased made a bequest of his claim under a depending submission, the legatee was found entitled to recover without

¹ Brodie, 21st Dec. 1757, M. 3912.

Executor, No. 20; Watson, 19th June

² Spence, 20th Feb. 1751, Elchies, voce 1782, M. 7009.

confirmation.¹ On the same principle, the spécial legacy of the deceased's share in a mercantile company is a complete title to such share.²

4. The rights of legitim in children and of *jus relictæ* in a widow do not require confirmation for their completion. They are, in fact, claims of debt as against the executor. And, in like manner, when two out of three next-of-kin obtain confirmation in their favour, the third next-of-kin cannot proceed to make up his title to a third of the estate by confirmation to the deceased. The estate is no longer *in bonis defuncti*. The third next-of-kin has only a claim of debt against the two who have confirmed.³

5. The *nominatim* substitute in a personal bond does not require confirmation to complete his title on the decease of the institute or original creditor. On that event, the right vests in the substitute by mere survivance of the institute.⁴

¹ Lyle, 2d Dec. 1842, 5 D. 236.

² Bell, 13th January 1831, 9 Sh. 266.

³ Spalding, 15th May 1811, F. C.

⁴ Monro, 2d June 1733; Elchies, *voce* Service and Confirmation, No. 1.

TITLE VI.

ENTRY OF VASSALS.

I WILL now call your attention to points connected with the entry of vassals with their superiors. In reference to this subject generally, it is important to keep in view that, in the case of proper feudal subjects, the radical right is in the superior, and that recourse must be had to him on all occasions in order to the complete substitution of a new vassal for the old vassal, either in the person of an heir or a singular successor.

When completing a title by entry with the superior, and especially SUPERIOR'S TITLE. when applying to any one as superior for a writ capable of registration, as in lieu of infeftment, or for confirmation of an infeftment or registered conveyance to be holden *a me* only, it is of essential consequence to ascertain that you are transacting with the true superior, and that his titles to the superiority are completed; or, if he holds the superiority in liferent only, that he has the powers of a fiar in regard to the entry of vassals. It is of comparatively less consequence when you are merely obtaining a confirmation from the superior of an infeftment or registered conveyance holden *a me vel de me*; because that constitutes an independent title, whether the confirmation is valid or not. The *a me* title, on the other hand, is defeasible until duly confirmed.

Although the superior who grants the entry and charter has not com- ACCRETION. pleted his title by infeftment or registration at the date of the charter, his infeftment or the registration of his title subsequently will accresce to his charter, and validate it. But the infeftment or registered title of assumed trustees will not validate a charter by the original trustees who were never themselves infeft.¹ The superior's sasine or other title must be completed by registration in the register of sasines. It was decided in one case,² that a vassal could not object to his superior's infeftment that it was not duly recorded; but it has since been decided that an unrecorded sasine is of no value whatever.³ A superior with an infeftment unrecorded, therefore, should be regarded as a superior uninfeft.

If the superiority has devolved on two or more superiors as heirs- HEIRS FOR-
TIONERS IN
SUPERIORITY. portioners, the vassal is not obliged to take his new investiture from the

¹ Martin, 3d Feb. 1841, 3 D. 485.

² Hill, 10th July 1828, 6 Sh. 1133.

³ Young, 16th Jan. 1844, 6 D. 370; and
11th March 1847, 9 D. 932.

heirs-portioners severally. He may require such investiture to be given by the whole jointly; unless the eldest, by the prerogative of her birth, takes the superiority exclusively to herself, when she can, by herself alone, grant the title to the vassal.¹ The right of the eldest heir-portioner to take the superiority to herself exclusively arises on the principle that the vassal's condition is not to be made worse by the multiplication of superiors over him. But it is not multiplication to vest the superiority by one title in two or more persons jointly as *pro indiviso* proprietors. Such proprietors cannot act separately. Each has in a certain sense a right in the whole; and when enforcing any of their rights they must all act together. There are not two or more estates, but one estate only. The superiority is not split at all.²

**LIFERENTER BY
CONSTITUTION.**

Where the superiority has been conveyed to any one in liferent, the liferenter (called in that case a liferenter by constitution) cannot grant an effectual entry or charter unless he has special power from the fiar to do so.³ But, when such liferenter has special power from the fiar to grant charters to vassals, the power is a quality of his right, and an entry granted by him is effectual in like manner as if the fiar had granted it.⁴

**BY RESER-
VATION.**

A liferenter by reservation, however, is entitled to grant entries equally as the fiar, although special power to do so is not contained in the clause of reservation;—on this principle, that his reserved liferent is considered a continuation during his lifetime of the right of possession which he enjoyed as fiar, together with its current pertinents.

**ENTRY FROM
ONE NOT
SUPERIOR.**

If an entry be taken from one having neither the substantial right to superiority, nor an *ex facie* good title thereto, the writ granted will be inept, and any conveyances or other titles whose validity depends upon it will be reducible.⁵ But if the vassal takes his entry from one who really has the substantial right as superior, and whose title is *ex facie* good, the vassal's entry and title will stand good, though it shall afterwards be found that the superior's title was inept, and such title is reduced.⁶ Indeed, if the superiority title be *ex facie* good, the vassal is not entitled to plead objections to it arising from the fact that the superiority was formerly entailed.⁷ If the vassal or his predecessors have once recognised the right of the superior by taking an entry from him, it is not competent to them afterwards to object to the superior's title.⁸ But the superior, if he is a singular successor in the superiority, will be obliged, if required, to produce the progress by which he has acquired right to the superiority, before the vassal can be compelled to enter with him, unless the vassal has formerly owned his right by taking a charter from him.⁹ And if the superior's title consists of a charter in favour of A., disposition and assignation by A. to B., and sasine in favour of B., or

¹ Lady Luss, 30th July 1678, M. 15,028.

² Cargill, 21st Jan. 1837, 15 Sh. 408.

³ Henderson, 19th Feb. 1836, 14 Sh. 540.

⁴ Gibson-Craig, 10th July 1838, 16 Sh. 1332; affirmed 23d Sept. 1841, 2 Robinson's App. 446.

⁵ Henderson's case.

⁶ Gibson-Craig's case.

⁷ Innes, 20th November 1844, 7 D. 141.

⁸ Stair, ii. 4. 6. & ii. 11. 29.

⁹ Bankton, ii. 11. 24.

its equivalent, the whole writs must be produced. It is not enough to produce the charter to A. and the sasine of B. or its equivalent; as the charter by itself is not a warrant for B.'s sasine.¹

The heir of the last complete investiture, that is, of the last investiture flowing from or confirmed by the superior, is entitled,—except probably in one single case to be afterwards specified,—to be entered with the superior on payment of the casualty of relief, which, when not otherwise stipulated, consists of one year's feu or blench-duty. The heir of a tailzied investiture which has been recognised by the superior without qualification is entitled to be entered as an heir on payment of relief, though he is heir of entail only, and not heir of line of the vassal last entered.² The superior, in recognising the entail, may have reserved right to claim, from every heir of entail who shall not be also heir of the last investiture preceding the entail, the composition due by a singular successor. But if the institute, or any heir of entail, entered by the superior, shall have paid such composition, the entail investiture is thereby enfranchised, and all the subsequent heirs of entail are entitled to be entered on payment of relief, whether they are heirs of the preceding investiture or not.³ And, where there is a trust for the express purpose of making an entail, the entry of the trustee, and his payment to the superior of a singular successor's composition, enfranchises the institute and whole heirs of entail, and entitles them all, in their order, to be entered on payment of the entry-money due by heirs.⁴ The heir of the last investiture has right to be entered on payment of the entry-money due by an heir, not only when he enters by precept or writ of *clare constat*, but also when his entry is taken in the form applicable to the title of a singular successor.⁵ In Mackenzie's case, the heir of the last investiture entered in virtue of an entail by the last vassal; and the ground of the judgment appears to have been that no liability to a singular successor's composition existed at the time of the entry, and that it would be unjust to make the heir of investiture pay more than was due by an heir, on the mere chance that some future heir of the new investiture might be different from the heirs of the old investiture. The Court reserved, however, on the one hand, to the superior any claim he might have to a year's rent or other composition on the entry of any future heir of tailzie not an heir of the investiture prior to the tailzie, and, on the other hand, to the heir all defences against the claim as accords. The case of Hastings was exactly similar in principle; and the Court held Mackenzie's as having settled the point. The entry, however, was granted subject to the like reservations as in Mackenzie's case.

ENTRY MONEY
DUE BY THE
HEIR.

HEIR OF A
TAILLIED
INVESTITURE
RECOGNISED BY
SUPERIOR.

¹ Maconochie, 29th May 1852, 14 D. 813.

² Duke of Hamilton, 22d Nov. 1827,
6 Sh. 94.

³ Stirling, 14th Feb. 1842, 4 D. 684;
affirmed 4th Sept. 1844, 3 Bell's App.
128.

⁴ Advocate-General, 14th Nov. 1854, 17
D. 21.

⁵ Mackenzie, 4th July 1777, M. 15,053,
5 Br. Sup. 613; Marquess of Hastings, 7th
May 1859, 21 D. 871.

SUPERIOR'S
RESERVATION
OF CLAIM.

As regards the effect of the reservation in favour of the superior, we have seen from Stirling's case that, if any heir under the new investiture has once paid a singular successor's composition for recognition of the new investiture, subsequent heirs are entitled to be entered on payment of relief, as being heirs of investiture. But, supposing that the superior has recognised the new investiture, as in Mackenzie's and Hastings' cases, without receiving the composition payable by a singular successor; then, if he has reserved his claim against any heir of the new investiture who is not also, when he enters, the heir under the old investiture, it is not decided that the superior has no claim against such heir. On this point Lord Benholme observed, in Hastings' case, that the fact of the clauses of reservation of the superior's claim being held ineffectual in cases where the year's rent had been once paid 'suggests' no reason for anticipating that the clause of reservation will be ineffectual in the present case, where the year's rent is not to be paid now, but where the question is reserved till the succession divides.' In this last case, therefore,—that is, when the line of succession under the new investiture diverges from that under the old,—it would seem reasonable that the heir of the new investiture should pay the entry-money due by a singular successor, because he is not then—that is, when the succession opens to him—the heir entitled to succeed under the former investiture.

Where the property-fee has been conveyed by the vassal therein to two or more individuals, as individuals, and their heirs and assignees, the entry of the one individual or his heirs in the one-half of the property *pro indiviso* does not exclude the superior's claim to an entry from the other individual or his heirs in the other half *pro indiviso*. The other half is a separate feudal tenement, and is in non-entry until the proprietor thereof obtains an entry.¹

HEIR OBTAIN-
ING AN ASSIGN-
ABLE CHARTER.

The heir of the last investiture may have a special disposition from his predecessor, containing procuratory of resignation; and, supposing a charter of resignation following thereon to be granted and delivered to him unconditionally, there can be no doubt of his right to assign such charter to any third party. The assignee can register the charter and disposition and assignation in his favour, or he can expedite notarial instrument; and, having thereby obtained an investiture flowing from the superior, he is a vassal fully entered; and it is thought to be undoubted that the superior has no claim upon him for entry-money. The superior granted and delivered an assignable charter, which has been assigned,—and he must take the consequences. But the superior is not bound to grant to an heir, on payment of relief merely, an assignable charter, to the effect of having a stranger introduced as vassal, by assignation of the charter, without payment of composition.² The superior cannot refuse an entry to the heir; but the Act which imposes the obligation on the

¹ Scott, 18th July 1863, 1 Macph. 1164.

² Magistrates of Musselburgh, 21st Feb. 1804, M. 15,038.

superior does not say that he is to grant a charter, but that he is 'to receive or grant new infeftment to' the heir.¹ And I apprehend that the superior is entitled to obtain security, before delivering an assignable charter, that the same shall be registered by or on behalf of the grantee, and that the charter shall not be assigned.

The case, or at least the remedy, is different as applicable to the holder of an original charter. Until registration thereof, the relations of superior and vassal have not been constituted, and action of non-entry is incompetent. There never has been a vassal, and there can be no non-entry. If the superior has granted an assignable charter, it is still unsettled what is his remedy. It is not competent for him to cause his own agent to register the charter.² I can hardly doubt that the superior has action to compel the registration of the charter, and the constitution of the feudal relations, so as to secure his casualties. But it is well to provide against the loss of casualties, either by stipulating for a certain payment at fixed intervals, in full of all demands, or for payment of casualties on every transfer, whether there shall be an entry with the superior or not, or to provide that the charter shall not be assignable.

The superior is not bound to grant an entry for payment of the heir's relief to any one except the heir himself. The heir's right is purely personal; and the trust-disponees of the last entered vassal, though holding for the heir of the vassal, are liable to pay a singular successor's composition when they enter.³ But, notwithstanding a trust-disposition by the last vassal in favour of strangers, and although the trustees have been infeft thereon, yet, if their right has not been confirmed by the superior, the heir is entitled to be entered, and the superior cannot refuse him an entry on the ground that the lands have been disposed to trustees who are infeft. It was so found where the superior raised an action of non-entry against the last vassal's trustees, in which he called the heir of investiture also.⁴ And it appears that the heir of investiture can insist, in any circumstances, on being entered as heir, if no third party has entered in the meantime.⁵ But, as a general rule, the superior may refuse to enter the heir, unless his right is established by service:⁶—not, however, if the superior has called the heir in an action of non-entry.⁷

In bringing an action of non-entry, it is usual to call the heir as well as the disponent, when there is a disponent, of the last vassal; and if the party having or claiming right to the lands does not hold a formal disposition, and therefore is not in a situation to take an entry at once, the heir must be called.⁸ But, if there are disponees holding a formal con-

¹ 20 Geo. II. c. 50, s. 12.

² Stewart, 12th November 1794, M. 15,027.

³ Grindlay, 18th Jan. 1810, F. C.

⁴ Hill, 5th Feb. 1824, 2 Sh. 681.

⁵ Haig, 16th May 1821, 1 Sh. 12; Piggott, 9th Dec. 1829, 8 Sh. 213.

⁶ Fullerton, 18th July 1678, M. 9293; 21 & 22 Vict. c. 76, s. 11.

⁷ Hill's case.

⁸ Magistrates of Hamilton, 2d Feb. 1854, 16 D. 437.

veyance from the last vassal, it is not absolutely necessary to call the heir.¹

When the superior brought an action of non-entry against the proprietor of the lands, who was not then the heir of the last investiture, and in the course of a protracted, but ultimately unsuccessful, defence, founded on competing claims to the superiority, the proprietor of the lands became heir of the investiture,—it was found that he was nevertheless bound to enter and pay entry-money as a singular successor.²

**CORPORATION
VASSAL.**

The superior is not bound, without express stipulation, to enter a corporation as vassal; because a corporation never dies, and, were such entered, the right to future casualties would be excluded in perpetuity.³ But a special stipulation for the entry of a corporation will receive effect, and, if made a real burden on the superiority, will be available even against a singular successor therein, in whose titles it does not appear.⁴ The usual custom, in cases where corporations acquire lands, is, either that they name a trustee to hold for their behoof, in whose favour an entry is granted, such entry requiring renewal on his death; or that the corporation itself enters, under an obligation to pay the amount of the composition exigible from a singular successor at periodical intervals, varying from fifteen to twenty-five years; or there may be paid for the first entry a sum intended to meet the composition then due, and future compositions at periodical intervals for ever after.⁵ In Campbell's case, the charter was granted to an office-bearer of the corporation; and the Lord Justice-Clerk Hope held that the corporation were entitled in their option to a charter in favour of themselves.

TRUSTEES.

Trustees usually have a title with survivorship; and, when they obtain a charter simply in terms of a title so qualified, there is no subsequent entry due until the death of the last survivor of them. It is usual in such cases, however, to stipulate that the superior shall have right to claim entry-money on the death of some one or other of the trustees, or of the beneficiary under the trust; the trustees having the option of selecting the particular life on which the casualty shall depend; or, if the trust is to be of long endurance, the same arrangement can be made as in the case of a corporation.

**SINGULAR
SUCCESSOR.**

An ordinary singular successor is entitled to be entered either by resignation or confirmation, and on payment of one single composition, whatever number of transmissions may have taken place between the last vassal and him. The singular successor, on applying for his entry, must produce his predecessor's and his own titles, and pay or tender the entry-money due by him, and the non-entry duties, if any are outstanding.

The entry-money due by a singular successor is a year's rent of the

¹ Magistrates of Dundee, 26th June 1829, 7 Sh. 801; Hay Mackenzie, 10th July 1838, 16 Sh. 1326; Scott, before cited.

² Wallace, 2d March 1836, 14 Sh. 599.

³ Hill, 17th Jan. 1815, F. C.

⁴ Learmonth, 15th Feb. 1854, 16 D. 580.

⁵ Campbell, 28th June 1843, 5 D. 1273.

subjects, whether lands or houses, 'deducting the feu-duties, and all COMPOSITION.
' public burdens, and likewise all annual burdens imposed on the lands
' by consent of the superior, with all reasonable annual repairs to houses
' or other perishable subjects.'¹ The rent of houses built by the purchaser
himself after his purchase, but before his entry, is to be taken into
account.² Salmon-fishings, and lands let yearly in grass, are estimated
at the medium rent for the last seven years; and victual rents are con-
vertible at the current prices in the local markets.³

The rent of game and shootings actually let, I apprehend, must be
taken into account. Probably the yearly value of game and shootings
unlet will now be claimed by superiors; their claim being founded on
the case of Leith,⁴ where such value was held liable to be taken into
account in estimating the amount of the provisions payable to younger
children out of an entailed estate. Whether the same principle is appli-
cable to the case of a superior's composition, is a new point, and one which
requires careful consideration. But the annual produce of coal and other
minerals, though let to tenants, is not properly annual rent. The sub-
jects are part of the substance of the lands, and not of their mere fruits or
produce. I am not aware of anything like a rule of practice as applicable
to the composition in such cases. Probably a moderate value, say eight or
ten years' purchase of the yearly produce, might be taken as the estimated
price of the subject, and a year's interest thereof stated as the composition.

It may happen that the lands have been let at an early period on
long leases, the yearly return under which is greatly below the present
value. But, assuming that no fraud against the superior was intended
in the granting of the leases, it is thought that the rent due under the
leases is the limit of the superior's claim. But where the long leases, as
well as the feudal right, have been acquired by the same individual, the
leases are extinguished *confusione*, at least if the leases are held by the
same individual at the time the entry is taken: they constitute no right
separate from the feudal right; and the composition for entry is to be
calculated with reference to the actual rent or value of the lands as at
the time the entry is taken, not the rent under the sopited long leases.⁵

Lands may also be subfeued when there is no valid prohibition against SUB-FEUS.
subinfeudation; in which case, and supposing the sub-feus to be granted
bond fide, and for the fair value of the lands at the time, the sub-feu-
duty is the rent in a question with the superior; and he cannot demand
a year's rent of houses built by the sub-vassals under a lawful contract
to which he is no party.⁶ Where the sub-feu is granted for a price as
well as a feu-duty, the superior will draw a year's sub-feu-duty, and also
the interest of the price.⁷ But when a sub-feu had been granted for a

¹ Aitchison, 14th Feb. 1775, M. 15,060,
5 Br. Sup. 613; Anderson, 25th Nov.
1791, not reported.

² Anderson, 30th Nov. 1824, 3 Sh. 334.

³ Magistrates of Inverness, -23d Jan.
1771, M. 9300.

⁴ Leith, 10th June 1862, 24 D. 1059.

⁵ Lord Blantyre, 1st July 1858, 20 D.
1188.

⁶ Ross, 6th June 1815, F. C.; affirmed
24th July 1820, 6 Paton's App. 640.

⁷ Campbell, 28th July 1832, 10 Sh. 734.

price only, and a mere elusory duty, and the price was unknown, and when the sub-feu had been acquired by the immediate vassal,—an opinion was expressed in the case of Blantyre, before referred to, that the sub-feu was to be disregarded, and the lands estimated for the superior's composition at their present value.

TEINDS.

The deductions from the rent have been already generally stated. Where the vassal does not hold the teinds under the superior of the lands, he is entitled to have a fifth of all the teindable rental deducted in estimating the composition, and that whether the teinds have been valued or not.¹ Teinds are a separate estate; and the question of valuation or no valuation is *res inter alios* as regards the superior. On the other hand, when the fifth for teinds is deducted, the minister's stipend, being a burden affecting the teinds, is not deducted. And I apprehend that the superior of teinds which are held independently of lands is equally unaffected by valuations as the superior of lands which are held independently of teinds; and that he is entitled to a fifth part of the land-rent, as being the rent of the teinds, under deduction of the minister's stipend, on his granting an entry to a singular successor in the teinds.

TAXED COM-
POSITION.

We frequently find the amount of the composition or entry-money payable by a singular successor fixed or taxed at a particular amount. And when the taxation is competently declared, and distinctly applicable to singular successors, it will receive effect, whether for or against the vassal. Lands were feued out to partners of a company for carrying on an iron manufactory, under a prohibition to sell, and a stipulation for payment to the superior of a duplicand of the feu-duty every twenty-five years, 'in lieu and place of the composition for entry of heirs, or the entry of singular successors, in the share or shares of any of the said parties in the feu, while it remains with the company as such;' and in case any of the parties or their heirs should, notwithstanding the prohibition, sell the ground, the purchasers should be liable to pay £500 for an entry as singular successors. The original company sold the ground to another company, which continued to carry on the same manufacture; and it was held that this was a sale not protected by the stipulation for a duplicand merely every twenty-five years, and that the purchasers were bound to enter and pay the £500.²

ASSIGNEES
BEFORE IN-
FEBTMENT.

Questions of much difficulty have often arisen as to the meaning of particular terms made use of in clauses of taxation, and how far singular successors were included in clauses where these words were not expressly used. As a general rule, the clauses of taxation, as limiting the legal rights attached to the superiority, are *strictissimæ interpretationis*.³ When the *reddendo* stipulated that the vassal's heirs and assignees should pay the double of the feu-duty the first year of their entry, 'as use is of feu-farm,' the Court held the term 'assignees' in the taxing clause applicable only to assignees of the precept in the feu-right before

¹ Thomson, 24th Nov. 1825, 4 Sh. 224.

³ Bankton, ii. 4. 34.

² Earl of Mansfield, 22d May 1829, 7 Sh. 642.

infetment, and not to ordinary singular successors.¹ An obligation, in the original feu-right, to enter the 'heirs and successors' of the feuar as vassals in the lands, for payment of a specified sum 'at the entry of each heir,' 'and that as the composition for the entry of each vassal,' does not apply to the entry of singular successors.² But, when the obligation is expressly in favour of 'singular successors,' though embracing in one sentence both heirs and singular successors, and placing both on the same footing, and, moreover, coupled with the erroneous expression 'as use is of feu-farm,' the entry of singular successors appears to be taxed.³ And the word 'assignees' is a flexible term: in the general case, it means assignees of the precept before infetment, but it may be used with a wider signification. Accordingly, when the superior bound himself to enter the heirs and successors of the feuar for payment by each heir at his entry of five merks, and by each 'assignee to whom the lands shall be disposed' of ten merks, the entry of singular successors was held to be taxed.⁴ The opinion of the whole Court was taken in this case. It is particularly to be observed, that not only does the clause say assignees 'to whom the lands shall be disposed,'—thereby enlarging the usual signification of the term 'assignees,'—but the sum payable by each such assignee is double the amount payable by each heir; and the addition of the words, 'as use is of feu-farm,' does not occur.

The obligation of taxation must, however, be validly imported into the proper feudal investiture. It is not enough that it occurs in a disposition, in implement of which the feu-right is granted, if the feu-right also does not express it. In the case of M'Lachlan,⁵ possession had followed for more than forty years, in virtue of the proper feu-charter and subsequent titles, in none of which was the obligation to enter singular successors inserted; and the entry was found not taxed. On the other hand, if the obligation is once duly inserted in the feu-charter, its omission in charters of mere renewal of the feu, technically called 'charters by progress,' though on these possession is enjoyed for forty years and upwards, does not extinguish it. All such obligations are held as repeated in charters by progress, if nothing to the contrary appears therein.⁶ And the obligation may be contained in the titles of the superior as well as of the vassal.⁷ In special circumstances, the composition for a singular successor's entry bears interest.⁸

When any irritancy of the feu-right has been incurred, or where the *NOVODAMUS*. original feu-right is not duly stamped, or where any alteration of the feudal contract is to take place, the usual and simple course is to obtain from the superior a charter of *novodamus*, or to have a clause of *novodamus* incorporated with a charter of resignation. As far as the subject

¹ Magistrates of Inverness, before cited; Salmon, 25th July 1751, M. 4181.

² Thomson, 22d May 1810, F. C.

³ Innes, 22d June 1822, 1 Sh. 518.

⁴ Hamilton, 16th July 1853, 15 D. 925.

⁵ M'Lachlan, 14th May 1823, 2 Sh. 303.

⁶ Stewart, 3d June 1813, F. C.

⁷ Learmonth's case, before cited.

⁸ Magistrates of Edinburgh, 27th Feb. 1835, 13 Sh. 571.

conveyed by the *novodamus* is new, or has not been validly conveyed by the prior charters, the new grant is equally effectual as if there had been an antecedent title. It is, in fact, an original feu-charter, as far as it goes.¹ But, when what is granted is qualified by the term 'used and wont,' the right conferred is restricted to what was formerly in use to be enjoyed.² But a mere charter of *novodamus* from the superior, as applicable to what he has already given out by a valid charter, is of no value as a feudal title. It is good as against the superior, and will be good against all and sundry by uninterrupted prescriptive possession, but not otherwise. Thus, where a party obtained a disposition to himself, on which he was not infeft, and thereafter went to the superior and took a charter of confirmation and *novodamus* to himself in liferent, and his son in fee, but without having resigned the lands in the superior's hands, it was held that the charter transferred no right to the son. The lands were not in the superior's hands, and he had nothing to give out; therefore infeftment taken by the father, in virtue of the disposition, was found preferable to a right derived from the son.³

¹ Scot, 29th Feb. 1680, M. 9339.

² Bruce, 25th Nov. 1714, M. 9342.

³ Grieve, 11th December 1760, M. 3022.

TITLE VII.

HERITABLE SECURITIES.

CHAPTER I.

HERITABLE securities may be constituted by *reservation*,—as when the proprietor of lands disposes the same, subject to a real and preferable lien or burden in his own favour;—or by *constitution* in various ways, but, it may be said generally, in forms of two classes,—the one a deed of conveyance expressly in security (usually a bond and disposition in security), the other a deed of absolute conveyance qualified by a back-bond, declaring the disposition, though in form absolute, to be really in security only.

The most frequent case of real burden by reservation occurs when the seller of lands allows a portion of the price to remain unpaid, and to stand as a debt due to him by the purchaser. Being part of the consideration for the lands, it is the natural arrangement that the payment should be charged and secured upon the lands; and this is done by declaring it a real and preferable burden thereon in the disposition to the purchaser. At the same time, the purchaser, whose debt it is, grants the seller a personal bond for payment.

In such cases, the disposition by the seller to the purchaser bears to be granted in consideration of a certain sum (if any is) paid to him, 'and in consideration of the further sum of £ , herein declared to be a real burden upon and affecting the lands and others after disposed, and which sums of £ , and £ , make up the 'agreed-on price of the said lands.' The disposition then disposes the lands in usual form, adding at the close of the description, and after the clause conveying all right, title, and interest, a declaration that the lands are disposed with and under the real and preferable burden of the sum still unpaid (the amount of which must be specified), with the interest thereof, and penalty in case of failure if incurred. The disposition then bears that these sums are all contained in the purchaser's personal bond (if the case be so), and declares the same to be a real and preferable burden affecting the lands, appointing the same to be

REAL BURDEN
BY RESERVA-
TION.

REAL BURDEN. engrossed in any instrument of sasine or notarial instrument to follow on the disposition, and to be so engrossed or validly referred to in all future deeds of conveyance and transmission, until complete payment of the amount, under pain of nullity in case of omission. The procuratory of resignation, and precept of sasine if any, will be qualified as granted with and under the real burden. And the instrument of sasine or notarial instrument, if any, in favour of the disponee will embody the clause declaring the real burden at full length; and, whilst the burden subsists, subsequent transmissions of the lands will refer to it, agreeably to the provisions of the Conveyancing Acts of 1847, and of the Acts of 1858 and 1860, so far as applicable.

The real right and security of the seller, however, will be completed—in terms of the agreement with the purchaser—by the registration of the purchaser's disposition, or of the instrument of sasine, or notarial instrument, if any, thereon, when framed as above directed. And, in cases where the right of the disponee is to be made real by instrument of sasine or notarial instrument, it is of essential importance to introduce an irritant clause in the disposition, applicable to the contingency of omitting the declaration relative to the real burden in the instrument of sasine or notarial instrument, if any. If the whole disposition is registered on an ordinary warrant of registration, it is of little consequence whether there is an irritant clause or not. The real burden will appear in the records as affecting the purchaser's title. But if sasine or notarial instrument is competently expedited, then, supposing that there were no irritancy, and that the instrument of sasine or notarial instrument were to omit the declaration of the real burden, the instrument would be good and valid, and the seller would be fully divested, but the burden would not be real and preferable. It would stand merely on the declaration in the disposition and the personal bond. But if the irritancy be inserted in the disposition, then, although the clause of real burden were omitted in the instrument of sasine or notarial instrument, the omission would not injure the seller's security, because it would nullify the instrument; and the seller, being himself infeft in the lands or registered, would remain undivested. He has granted a disposition; but in the case supposed it is not registered, and no valid sasine or notarial instrument has followed on it. His right and security are therefore unassailable.

BY CONSTITUTION.

Real burdens may also be created by constitution in favour of third parties. This frequently takes place when a testator disposes his estate to one party, and burdens him with legacies or annuities to others; or when trustees are denuding of an estate in favour of the residuary legatee, whilst there are annuities or other claims outstanding, and which they are bound or entitled to charge as burdens upon the estate. In these cases the disposition or conveyance is granted under the real and preferable burden of the legacies or annuities, or as the case may be; and there ought always to be an order to insert the burdens in any

notarial instrument or instrument of sasine to follow on the disposition and conveyance, and to insert or refer to them in the subsequent titles, and relative irritant clause, as in the case of the real burden by reservation. The security of the legatees, etc., will be completed by the registration of the whole disposition, or by insertion of the burden in the disponee's sasine or notarial instrument.

But in every case it is essential that the burden be declared to affect the lands. The intention so to impose the burden ought to be expressed in the most explicit, precise, and perspicuous terms. Accordingly, when the disposition only said that the disponee should be burdened with, and bound to pay, the amount therein mentioned; or when it contained an express obligation on the disponee, his heirs, executors, and successors, without imposing the burden on the lands,—there was found to be no real or effectual burden created on the lands.¹ It is equally ineffectual to insert in the disposition merely a declaration that the same is granted under the burden of the specified sums, which are imposed on the disponee by acceptance; or with and under the burden of the payment of 'the sums following to the persons after named.'² And in such a case it makes no difference that the qualifying words have entered the disponee's sasine and the record.

The declaration of the real burden must be contained in the disposition which is registered, or on which the sasine or notarial instrument follows: it is not sufficient to constitute the burden by reference, in the disposition, to a separate deed in which the burden is declared.³ And as there can be no unknown, or indefinite, or uncertain incumbrance on land, both the sum to be paid and the name of the creditor must be specified in the disposition and instrument of sasine or notarial instrument, if any.⁴ With reference to the specification in the sasine, it is not enough to set forth the total amount due to several creditors, without giving the names of any of the creditors, or saying what was due to each, but merely referring to a relative list.⁵

The reserved burden is not a proper feudal estate. The creditor is not registered or infeft in the estate in security. He has only a lien imposed by way of qualification upon the real right of another. His heir-at-law, therefore, takes up the right by general service.⁶ In transmitting the right, the creditor grants a simple assignation, which is completed by intimation to the debtor, and registration in the appropriate register of sasines for publication.⁷ And an assignation of the debt will carry the real burden, and entitle the assignee to grant a

¹ M'Kenzie, 1st April 1721, Robertson's App. 355; Martin, 22d June 1808, M. App. Personal and Real, No. 5; Forbes' Trustees, 14th December 1833, 12 Sh. 219.

² Stewart, 18th May 1792, M. 4649; M'Intyre, 3d Feb. 1824, 2 Sh. 664.

³ Allan, 19th July 1780, M. 10,265; affirmed 15th May 1781, 2 Paton's App.

572; see also Wylie, 19th Jan. 1830, 8 Sh. 337.

⁴ Stenhouse, 21st Feb. 1765, M. 10,264; and Allan's case.

⁵ M'Donald, 24th Feb. 1821, Hume, 544.

⁶ Cuthbertson, 7th March 1806, M. App. Service and Confirmation, No. 2.

⁷ Brown, 8th Feb. 1820, Hume, 540.

valid discharge thereof, though the real burden shall not be expressly assigned.¹

**DISCHARGE OF
REAL BURDEN.**

The incumbrance is extinguished as ordinary debts are; but, when the debt is paid, a discharge ought to be granted, and placed in the proper register for publication.

Real burdens by reservation will stand as first charges on the disponent's right. The creditors in real burdens by constitution are preferable according to the date at which the conveyance declaring the real burden is registered, or followed by sasine or notarial instrument. Real burdens, whether by reservation or constitution, are to be attached by adjudication, not by arrestment.²

**GROUND-
ANNUALS.**

I now notice real burdens for Ground-AnnuaIs. These are annual payments, sometimes called rent-charges, created real burdens on lands either by reservation or constitution, on the same principles as those applicable to real burdens for capital sums. The ground-annual, in its practical operation, and so long as it is duly kept up as a real burden, is substantially the same as the feu-duty. Indeed it may be regarded as a substitute for the feu-duty, as it is little known in cases where the law allows the constitution of a feu-duty. In disposing of lands within or near towns, it is often the wish of the seller rather to increase his yearly income than to part with his property, and of the buyer to pay the price in an annual rather than a capital sum. If the land can be disposed for payment of a yearly feu-duty, the relations of superior and vassal will, in such cases, be constituted, and the annual payment will be secured in the simplest and surest way. But if the lands are held by burgage tenure,—in which case they cannot be sub-feued by individual proprietors,—or if the titles contain a valid prohibition against subinfeudation, the parties have no alternative but to transact by way of ground-annual and real burden therefor. The amount will be the same as the feu-duty would be if a sub-feu were created; and, if desired, the casual or contingent payments, falling due by law in the case of proper feu-holdings, can be made matter of stipulation.

The ground-annual is a right of very early origin. Mr. Ross conjectures that it owed its introduction to the Statute said to have been passed in Scotland in imitation of the English Statute '*Quia emptores terrarum*,' which, as abolishing subaltern infeftments, was the occasion of new expedients for constituting real rights over land property. Whether this view is correct or not, the result stated is entirely consistent with our own experience, that ground-annuaIs are resorted to only when sub-feu rights are not attainable. In confirmation of the opinion that the ground-annual was of early origin, Mr. Duff³ notices that, in a judicial sale which occurred in the year 1762, a claim was

¹ Baillie, 7th July 1821, 1 Sh. 108.

² Bell's Comm. i. 693.

³ Duff, p. 200.

advanced, founded on the grant of a rent-charge or perpetual annuity to the friars-predicators of St. Monance in the year 1477, completed by possession alone, and never clothed with infeftment, to which the College of St. Andrews had acquired right; and the claim was sustained by the Court as a real burden on the lands, though appearing in no records; because rent-charges were customary in Scotland before infeftments of annualrent were introduced, and they were real rights even without infeftment, so as to be effectual against all singular successors. The Court, however, ordered the rent-charge to be inserted in the articles of sale as a burden on the lands; and it would no doubt appear in the future titles.¹

The ground-annual,—like the real burden for the price, or a portion of the price, of lands sold,—is constituted a preferable charge on the lands, by the disposition or deed of conveyance thereof in favour of the purchaser; and, when so constituted, the deed will bear to be granted in consideration of the ground-annual,—as in other cases the consideration is a price paid down, or an annual feu-duty. The amount of the ground-annual, and of the casual or contingent payments, must be specified, also the name of the creditor; and the ground-annual must be expressly made a real burden on the lands, and published on the record as such by registration of the purchaser's conveyance, or of an instrument of sasine or notarial instrument thereon. It must likewise be embodied, or validly referred to, in all the subsequent titles of the lands; and there is the same reason for introducing an irritancy, in case of the omission to embody or refer to it (as the case may be), as there is in reference to the ordinary real burden.

The security of the creditor will be completed by the registration of the conveyance, or of the purchaser's sasine or notarial instrument, if any, when duly framed. But, in order to preserve the security, the real burden must be duly embodied or referred to in the subsequent titles; and, if omitted for the space of forty years, the real security will be lost by prescription. In this respect, the right constituted by real burden is inferior to that by feu-duty, as the superior is not affected by the non-insertion of the feu-duty in his vassal's title. His right is independent of his vassal's sasine or other title; and, though the feu-duty may happen to appear in the vassal's titles, the insertion of it therein is not required for any purpose of security to the superior. It is mainly on this account that the security by real burden is inferior to that by feu-right.

The ground-annual, when duly made a real burden, authorizes the poiding of the ground; but, when constituted in its simple form, it gives no active title of possession, unless followed by adjudication. And this has led to an altered and materially improved form of constituting the right and security of the creditor. Until of late years, we find ground-annual rights constituted simply by disposition, with reserved

¹ College of St. Andrews, 3d Feb. 1762, M. 10, 171.

**CONTRACT OF
GROUND-
ANNUAL.**

real burden, and sasine thereon. But (after some intermediate stages) we have now a complex but very complete deed of constitution in a contract between the seller and the purchaser, called the Contract of Ground-Annual, which consists of the following parts and clauses; viz,—

1. The seller, in consideration of the ground-annual, and of the obligations undertaken by the purchaser, and under the real burdens expressed in the deed, sells and disposes to the purchaser the lands, with all right, title, and interest, in usual form.

2. Then follows, in usual form, the declaration by which the ground-annual is made a real burden, with which may be incorporated the burden of casual payments on transference to purchasers or the succession of heirs.

3. For security (as in the case of a feu-duty) there will usually be an obligation to erect and maintain a house of a specified value on the ground.

4. There will also be a declaration of irritancy in case of failing to build or maintain such house, or in case of allowing two years' ground-annual to run together unpaid, with clause of return in these cases to the seller.

5. The order to insert all these clauses and conditions in the purchaser's sasine or notarial instrument, if any, and to insert or validly refer to them in subsequent titles, under an irritancy, and with clause of return to the seller in case of omission.

6. Then follow the clauses declaring the term of entry, and other clauses usual in a conveyance of lands.

7. On the other hand, the purchaser binds himself to pay the ground-annual and casual payments, if any, as he would do an ordinary annuity with such additions.

8. Further (and here arises the principal distinction between the new and old forms of the seller's security), the purchaser, without prejudice to the real burden and personal obligations for payment, but in corroboration thereof, sells and disposes to the seller, in security of the ground-annual, not only a ground-annual of the specified amount to be uplifted out of the lands, but also the lands themselves, in the usual form of the disposition in security annexed to a bond of annuity.

9. The purchaser also binds himself, within a reasonably short space, to register his conveyance, or obtain himself infeft in the lands, and to obtain his title confirmed by his superior, if confirmation is required to complete his title.

10. There will then be consent to registration by both parties.

The executive clauses will all, of course, bear reference to the real burden in the usual form.

The contract of ground-annual will thereafter be recorded in the proper register of sasines for publication, which will complete both the purchaser's title and the seller's security for the real burden. In this way the seller not only has his real security completed by the mode formerly usual, but he has an active title by virtue of the personal obligation and security granted to him by the purchaser; and he can not only

point the ground, but also raise action of mailles and duties against the tenants, and enter into possession, in the same way that the creditor in an annuity secured by bond of annuity and disposition in security can.

When the ground-annual is constituted as above, though the real burden attaches to the subjects over which it is constituted, into whose hands soever they may come, the burden, in case of a sale, continues personal on the seller; and the purchaser is not personally liable except whilst he remains proprietor, unless it be expressly declared that purchasers shall become liable permanently. It was otherwise found in the case of *Peddie's Heirs*.¹ But in a subsequent case, where the decision of the Court here was in conformity with that in *Peddie's* case, the House of Lords reversed, and found as I have now stated.² In this respect the ground-annual is on the same footing with the feu-duty, when the feu-duty is constituted by separate personal bond or obligation. Where, therefore, it is intended that the *bond fide* sale of the property shall release the party liable in the ground-annual from future liability, the contract of ground-annual should contain an express provision to that effect. The purchaser, however, is personally bound, and cannot free himself, even when there is no personal obligation, so long as he is proprietor of the lands; and he cannot throw up his right to the lands against the will of the seller.³

The ground-annual, like the ordinary real burden, passes to an heir by general service, and to a purchaser by assignation, which ought to be recorded for publication, and likewise intimated to the debtor. It may be redeemable or irredeemable, according to agreement. Until the passing of the Act 16 & 17 Vict. cap. 63, no *ad valorem* stamp was payable in respect of ground-annuals when contained in deeds; but by that Act stamp-duty was imposed on the deeds of constitution of ground-annual rights, to be assessed on the same principles as in the case of a feu-duty of the like amount.

1063

I now proceed to securities by constitution in the more ordinary forms, being those applicable to the case of proper feudal or burgage rights. Passing over the earlier forms of security, I propose now to examine the Bond and Disposition in Security as framed in virtue of the Heritable Securities Acts of 1847 and 1854,⁴—that form being in universal use,—and to make such observations on the old forms as may seem necessary.

BOND AND DIS-
POSITION IN
SECURITY.

We have, first, a personal bond acknowledging receipt of the sum lent, and therefore binding the borrower, and his heirs, executors, and succes-

¹ *Peddie's Heirs*, 27th Feb. 1846, 8 D. 560.

² *Small*, 3d Feb. 1849, 11 D. 495; reversed 17th March 1853, 1 Macq. App. 345. The same decisions were pronounced in *Gardyne*, 8th March 1851, 13 D. 912;

reversed 17th March 1853, 1 Macq. App. 358.

³ *Magistrates of Inverness*, 28th Nov. 1827, 6 Sh. 160.

⁴ 10 & 11 Vict. c. 50, and 17 & 18 Vict. c. 62.

CLAUSES OF
BOND AND
DISPOSITION
IN SECURITY.

soirs whomsoever, renouncing the benefit of discussion, to repay the principal sum, at a specified time and place, with a fifth part more of penalty in case of failure, and the interest of the loan half-yearly during the not-payment, with a fifth part more of the interest of penalty in case of failure in payment thereof. The obligation for payment in this case is very similar to that in the personal bond which we formerly considered;¹ and I will not again go over points common to both deeds.

The sum to be secured, and the particular creditor or creditors under the bond, must be specified; as no unknown or uncertain incumbrance can be created over lands, in the form of a deed of security, any more than by a real burden.² The same objection arises whether the subject of the security be a proper land estate or merely a heritable security over land. If you are to constitute a security over a security upon land, the sum to be secured must be specified equally as if the security were upon the land; and, where the sums to be secured are contained in acceptances, it is not enough to describe these by their dates:—the amount must be specified.³ The term 'legal interest' should not be employed in reference to the rate of interest to be paid:—a specified rate should be inserted; and, as we are here dealing with a case of security, it is very important to insert such a rate as shall be likely at all times to satisfy the demands of the creditor. But the security under the obligation for penalty, whatever it covers, is to be ranked on the same footing with that for the principal sum and interest contained in the bond,—in short, to be dealt with as part of the original debt; and the expenses are not regarded as future debts.

We have then the disposition in security, in which the lands are disposed 'redeemably as after mentioned;' and I will notice the debtor's power of redemption when we come to the clause expressly reserving that power. The lands are also disposed irredeemably in the event of a sale in virtue of the bond; and I will notice this point when we come to the clause of sale.

In respect to the description of lands, I refer to what was said on the subject of the description in the absolute disposition.⁴ In bonds and dispositions in security over large estates, a description made up from rentals will often answer better than one from the titles. It will be more explicit and distinct, as containing expressly and beyond all doubt the lands on the security of which the loan is to be made. And, when the security is over particular farms, these may always be safely described as 'All and whole the lands and farm of A., as at present possessed by B., tenant thereof, lying in the parish of C., and county of D., with the whole parts, pendicles, and pertinents thereof.' To this may be added a specification of the extent and rent; and, if thought necessary, a general notice of the lands or barony of which the farm is a

¹ See *ante*, p. 233.

² Stein's Creditors, 1st Feb. 1793, M. 14,127.

³ Tod, 13th December 1838, 1 D. 231.

⁴ See *ante*, p. 552, *et seq.*

part. When the security is over the superiority of lands and feu-duties attached thereto, the conveyance should be of the lands, just as if the whole were disposed,—the superior having in fact a legal estate in the lands.¹ We have a case where the feu-duties, and not the lands, were disposed by a proper wadset;² but the donee or creditor was the vassal himself, and the question before the Court was with the reverser, and whether the wadset was proper or improper,—not with a third party claiming in virtue of a disposition of the superiority lands;—and there seems no good reason for adopting the mode there followed. There would, however, be no objection to uniting both modes, or to such a description as would bring out the real state and nature of the security; saying, for example, ‘which lands are held of me as superior by the following vassals, for payment of the yearly feu-duties after specified, and for payment and performance of other duties and casualties, conform to their rights and infeftments, viz., the lands of A. by B.; the yearly feu-duty payable therefor being ,’—and so forth.

Identification is the great point in securities, equally as in the case of absolute rights. But, in general, a greater latitude is allowed in framing descriptions of lands for the purpose of establishing identity in the case of securities,—as these are only temporary rights.

The clause, 'with all right, title, and interest,' as employed in absolute dispositions, should be used also in bonds and dispositions in security. I do not doubt that in proper loan transactions a full conveyance of the lands would convey into the security every right which the debtor had or should afterwards acquire in or connected with the lands. That principle received effect in a case³ referred to by Lord Corehouse as an authority.⁴ But considerable weight was given to the express use of the words in question in a case where a party, supposing that he had a heritable and feudal right, when he had only a beneficial right in virtue of a trust-deed, conveyed the lands with all his right, title, and interest therein.⁵ The words may be of material value also if the bond and disposition in security is granted not for onerous causes, but gratuitously.⁶

We have next the assignation to rents: 'And I assign the rents,'—^{ASSIGNATION TO RENTS.} which under the Act of 1847, sect. 2, imports 'an assignation to rents ' from the term from which interest on the sum in the bond commences ' to run ; including a power to the creditor, on default in payment, to ' enter into possession of the lands disposed in security, and uplift the ' rents thereof, subject to accounting to the debtor for any balance of ' rents actually recovered beyond what is necessary for payment of the ' creditor.' If the security is over, or comprehends, feu-duties, it would be well to add, after the words 'I assign the rents,' the words 'with the feu-duties and casualties.' The assignation to rents should not be

¹ Home, 22d Jan. 1794, M. 15,077.

² Fraser's Trustees, 9th Feb. 1790, M. 16.553.

³ Gillespie, 24th July 1764, M. 2860.

⁴ Gibson-Craig, 10th July 1838, 16 Sh. 1349.

⁶ Paul, 22d May 1835, 13 Sh. 818.

⁶ See *ante*, p. 570.

**CLAUSES OF
BOND AND
DISPOSITION
IN SECURITY.**

omitted: the assignation to the feu-duties and casualties should be introduced as an addition. The more full clause of assignation to rents, as given in the Style Book,¹ contains a declaration that the creditor's intromissions are to be instructed by his writ or oath, and that the creditor is not to be liable for omissions, nor the insolvency of tenants;—clauses which are hardly proper parts of the assignation to rents, and cannot be relied on as exempting the creditor from ordinary attention and diligence even in questions with the debtor, and still less when postponed creditors or the trustee in a sequestration are concerned. This clause, therefore, is of no great practical use; as a creditor is seldom in possession unless there is an insolvency. The importance of specifying in the bond the term from which the interest is to run is shown in this clause,—the creditor's right to rents commencing as at that term.

**ASSIGNATION
TO WRITS.**

We next have the clause: 'And I assign the writs,' which will be held to import an assignation to writs and evidents, to the same effect as in the fuller form now in use in a bond and disposition in security with power of sale. The corresponding clause in the bond and disposition in security given in the Style Book² contains no more than is above stated, except that it assigns 'the whole clauses contained in the writs, and all action and execution competent thereupon; surrogating and substituting the creditor in the debtor's full right and place of the premises.'

It is now settled that when the debtor holds his lands in virtue of a personal title, containing precept of sasine, such title, though intended for an absolute and irredeemable infeftment in the lands, may be made available for an infeftment in security and redeemable, in virtue of a bond and disposition in security, and the disposition of lands in security and assignation to writs therein contained.³ And when the granter of a bond and disposition in security had right to the lands in virtue of a general disposition only, and never completed further titles, the creditor is entitled to avail himself of the general disposition, though absolute and irredeemable, in order to acquire a redeemable title to the lands. He will, in virtue of the bond and disposition in security, and assignation to writs therein, bring an action of adjudication against the representative of the granter of the general disposition, in implement of the general disposition, and obtain decree of adjudication in implement to the extent of his right in security.⁴

WARRANTICE.

We have next the clause of warrantice, importing absolute warrantice as regards the lands and writs, and warrantice from facts and deeds as regards the rents. There is, of course, no need to except feu-rights and current leases: these are protected by the titles and possession of the feuars and tenants: and the measure of the warrantice against the debtor

¹ Juridical Styles, i. 312 (3d edit.)

² *Ibid.*

³ See the cases of Ponthron, 29th May 1805, Hume, 238; and Melvin, 17th June

1843, 5 D. 1217; and the older case of Mitchell, 16th July 1761, 1 Hailes, 185.

⁴ M'Gregor, 9th March 1843, 5 D. 888.

is the amount of his debt. No claim of damages, therefore, can arise against him in connexion with subaltern or leasehold rights.

We have next the power of redemption reserved to the debtor, and his obligation to pay the expenses of assigning and discharging the security; and, in default in payment, the power of sale. The import of these clauses is declared in sect. 3 of the Act of 1847, which says that the reserved power of redemption shall be as valid as if it had been provided by the bond that the lands should be redeemable by the debtor, his heirs and successors, from the creditor, and his heirs and successors, at the term and place of payment, or at any term of Whitsunday or Martinmas thereafter, on premonition of three months to be made by the debtor to the creditor, personally, or at his dwelling-place, if within Scotland; and, if furth thereof at the time, then at the office of the Keeper of the Record of Edictal Citations, within the General Register House, Edinburgh, in presence of a notary-public and witnesses; by payment to the creditor of the whole principal sum and interest due thereon, and liquidated expenses and termly failure if incurred; and in case of the creditor's absence, or refusal to receive the same, by consignation thereof in one or other of the banks in Scotland incorporated by Act of Parliament or Royal Charter, having an office or branch at the place of payment; to be made furthcoming on the peril of the consigner; the place of redemption to be within the office of such bank or branch thereof. It will be observed from this clause that it is important to specify a place of payment in the bond, and that a place should be fixed on where there is an agency for an incorporated or chartered bank. In practice, however, the premonition of intended payment and redemption is generally given by the debtor, or his agent, by simple letter to the creditor or his agent, who writes an acknowledgment of the receipt of the notice; and that is sufficient. But formal premonition and consignation, in presence of a notary and witnesses, may be necessary when the creditor is absent, or under some disability. Forms of the requisite documents, applicable to the case of a wadset right, and which can be easily adapted to suit the case of a bond and disposition in security, will be found in the Style Book.¹ In serving the premonition, the same accuracy should be observed as in serving a summons, or giving the charge on a decree.

The clause as to expenses imports that the discharge and renunciation, disposition and assignation, or other deed necessary to be granted by the creditor, upon the debtor making payment and redeeming, and also the recording thereof, shall always be at the expense of the debtor. Under this clause, the expense of assignations by the creditor, as to which the debtor is not consulted, will not fall upon the debtor; and, if the debt is divided into two or more portions without his consent or subsequent approval, I apprehend he is not bound to pay for discharges or assignations more than he would be liable for if the debt had remained

¹ Juridical Styles, i. 652 (3d edit.)

whole and undivided. When the term of payment of the debt is distant or uncertain, it may be well to add to the statutory clause, 'but only so far as such expenses shall be incurred after the term of payment of the principal sum hereby due shall have arrived.' The debtor ought not to be subjected in expenses arising merely for the creditor's convenience.

SALE. The power of sale is declared available to the creditor, if the debtor shall fail to make payment of the sums due under the personal obligation, within three months after a demand of payment is intimated to him by a notary-public and witnesses, personally or otherwise, as in the case of the premonition of payment to the creditor. The notice of three months in this case need not be before a term of Whitsunday or Martinmas. I see that, while the premonition of payment is to be given '*in presence of* a notary and witnesses,' demand of payment is to be made '*by* a notary and witnesses.' Whether any distinction is intended, may reasonably be doubted; but a very slight alteration in the form of procedure at making the demand would obviate all question on that point. The appropriate form of notarial instrument, requisition, and protest will be found in the Style Book.¹ The notice is declared to be available, and the subsequent sale to be good and effectual, whether the debtor is of full age, or in pupillarity or minority, or although subject to any legal incapacity. But it should be timeously followed up. Where notice had been allowed to stand over for three years, it was objected that it had been departed from, and should have been renewed before a sale. The objection was repelled,—but apparently because of the debtor acknowledging it in his condescendence to be in force.² Immediately after expiry of the three months, it is lawful for the creditor to sell the lands in whole or in lots, by public roup, at Edinburgh or Glasgow, or at the head burgh of the county within which the lands, or the chief part of them, lie, or at the nearest burgh or town sending, or contributing to send, a Member to Parliament; on previous advertisement, stating the time and place of the intended sale, and published once weekly for at least six weeks subsequent to the expiry of the three months of the notice, in any newspaper in Edinburgh, and also in any newspaper published in the county; or, if none in such county, then in the next or neighbouring county. Power is also granted to enter into articles of roup, and grant absolute dispositions, and other deeds requisite for rendering the sales effectual, in the same manner in every respect as the debtor could do himself.

The Act of 1847, by sect. 7, declares sales duly carried through in terms thereof to be as valid and effectual to the purchaser as if made by the granter of the security himself. But, by sect. 8, the creditor is bound to hold just count and reckoning for the price with the debtor and postponed creditor, if any, or with others interested; and to consign in a bank, to be named in the articles of roup, in the names of the seller and purchaser, for behoof of the parties having right, the surplus of the

¹ Juridical Styles, i. 750 (4th edit.)

² Glas, 29th May 1830, 8 Sh. 843.

price which may remain after deducting the debt secured and expenses attending the sale, and after paying all previous incumbrances, and the expense of discharging the same;—upon which sale and consignment the disposition to the purchaser is declared to have the effect of completely disincumbering the lands sold of all posterior incumbrances and securities, as well as of the security and diligence of the creditor selling. It is necessary, however, to see that the surplus price, if any, is paid to the right party. When the debtor is sequestered, the lands may be sold by the creditor, with concurrence of the trustee in the sequestration; in which case the Bankrupt Act¹ (sect. 113) makes full provisions as to the disposal of the price, and declares the lands freed and discharged of the debt of the creditor selling, and of all postponed securities, on the provisions of the Act being duly observed. If the heritable creditor alone sells, the trustee, or any posterior heritable creditor preferable to the trustee, may compel him to account for the price (sect. 112). But, if there is no sequestration, the safe course is to consign the surplus price, if any, in a chartered bank, and to call all parties, having or claiming an interest, in a multiplepounding, and obtain an exoneration from the Court.² It would seem, however, from Beveridge's case, that the Court would interfere to prevent a sale by a heritable creditor, on its being shown that, by the exercise of his power, injury would arise to the estate. He is, to a certain extent, trustee for the common debtor, and of course for his representatives; and therefore he must not exercise his right in a way hurtful to those concerned. On this principle of trusteeship it has been found that the heritable creditor selling is not entitled to become the purchaser;³ and the sale was reduced when the heritable creditor selling both acted as auctioneer and became the purchaser.⁴ And the Bankrupt Act (sect. 120) appears to prohibit his purchasing when he is himself selling; though the term which seems meant to apply to him is that of 'adjudger.' If he is not himself the seller, he can purchase. But when the creditor selling under a bond and disposition in security did become the purchaser, and made a judicial offer to give up his purchase on payment of his debt and expenses, the Court sustained the sale.⁵ But the burden of showing relevant grounds for restraining a preferable creditor in the exercise of the power of sale lies on the opposing party.⁶ The only absolute remedy, therefore, against an injurious sale, is to pay off the debt.⁷

In regard to the preliminary advertisements, the utmost care must be observed; because, if there is any shortcoming or error as to these, the whole proceedings will fall to the ground. We have seen that sales of entailed lands, in virtue of powers in private Acts of Parliament,

ADVERTISE-
MENTS.

¹ 19 & 20 Vict. c. 79.

² See Steven, 19th Feb. 1811, F. C., Bell's Comm. ii. 295; Dunlop, 19th Jan. 1821, Hume, 666; Beveridge, 17th Jan. 1829, 7 Sh. 279.

³ Taylor, 20th Jan. 1846, 8 D. 400.

⁴ Jeffrey, 16th June 1826, 4 Sh. 722.

⁵ Maxwell, 21st January 1823, 2 Sh. 130.

⁶ Kerr, 3d March 1830, 8 Sh. 628.

⁷ Lord Medwyn, in Kerr's case; and consulted Judges in Beveridge's case.

proved abortive, because of imperfect compliance with the requisites as to advertisement.¹ The same rules would apply in the case of sales under bonds and dispositions in security in the statutory form. But when there were two series of advertisements, the second of which was unexceptionable, it was found not relevant to show that the first was defective;² and in Dickson's case, and also in that of the Earl of Rosslyn,³ it was found that advertisement in a mere advertising paper was sufficient compliance with a provision in an Act requiring advertisement in a 'newspaper.'

CLAUSE OF
REGISTRATION.

We have then the clause of registration for preservation and execution, which is declared to import a consent to registration and procuratory for registration in the Books of Council and Session, or other Judges' Books competent, for preservation, and that letters of horning on six days' charge, and all other necessary execution, may pass on a decree to be interponed thereto;—and the clause of registration for publication, which entitles the creditor to register the bond either in the general or particular or burgh register of sasines, as the tenure of the lands embraced in the security may require. The creditor's right and security is completed by the registration of the bond and disposition in security in the proper register of sasines for publication.⁴

The effect of the bond and disposition in security, as constituting a real and preferable right in the lands, depends exclusively on the registration of the bond in the register of sasines; and the results of the registration are the same in the case of securities over lands held burgage, as over lands held by proper feudal tenures. The security thus constituted is preferable over the lands, in competition with other securities, or with purchasers from the debtor, according to the order of priority of the registration of the bond, and of the other securities or bonds. As to bonds, the Act of 1847 (sect. 5) makes the date of the entry in the minute-book the date of the registration. Registration of the bond and disposition in security must take place during the grantee's lifetime, in order to have the above statutory effect. But, if the grantee should die before registration, the bond will become (sect. 6) the warrant of sasine in favour of the party having right to it by service, adjudication, or otherwise; and infestment may be passed thereon, in, or as nearly as may be in, the form pointed out by the Infestments Act of 1845; and such infestment, when duly recorded, is declared to be good and valid to all intents and purposes. Of course the decree of service, or other connecting link, must be produced to the notary, and narrated in the sasine, as in the ordinary case of the sasine of lands following on a disposition or other connecting link; or we may now have a notarial instrument under the Titles Acts of 1858, sect. 14, and 1860, sect. 10.

In case of non-payment of the debt, the creditor's remedy is to

¹ Hope, 26th Jan. 1833, 11 Sh. 324;
Melville, 28th Jan. 1854, 16 D. 419.

² Glas, 29th May 1830, 8 Sh. 843;
Dickson, 15th Jan. 1831, 9 Sh. 282.

³ Earl of Rosslyn, 23d June 1830, 8 Sh. 964.

⁴ 10 & 11 Vict., c. 50, s. 1.

exercise the power of sale, if any is contained in his bond. If he has no power to sell, his best course would apparently be to get the debtor sequestrated, and to realize through the trustee in the sequestration. But sequestration may not be attainable or advisable,—in which case the creditor can realize the subject of his security by sale only if the lands are bankrupt, that is, burdened with heritable debts beyond their value, and if the creditors are in possession. In such case he can raise an action of ranking and sale before the Court of Session, under whose orders the sale will proceed as directed by the Act 1681, cap. 17; and the price will be applicable in or towards payment of his debt, under order of the Court.

NON-PAYMENT
OF DEBT.

But he can also poid the ground, or enter to possession of the lands, so far as they are in the hands of tenants, by an action of maills and duties. By the poiding of the ground, the creditor can secure to himself all the moveables thereon belonging to the proprietor; and likewise those belonging to the tenants, to the extent (in the tenants' case) of their rents past due and current at the time. The action of maills and duties against the tenants is a process to be raised before the Sheriff of the county where the lands lie. The creditor thereby comes, for the time, in the place of the landlord as regards the tenants. But, his right being only in security, the landlord's right as proprietor is only incumbered, not taken away, by the debt and security.¹ But, if the debtor is sequestrated, no poiding of the ground which has not been carried into execution by sale of the effects sixty days before the date of the sequestration, and no decree of maills and duties on which a charge has not been given sixty days before said date, is available in competition with the trustee, except for the interest of the current half-yearly term, and arrears of interest for one year immediately before such term, if so much be due;²—to the extent of securing which interest and arrears, poiding of the ground, or action of maills and duties, is lawful even after sequestration.

The heritable creditor, however, is preferable over the rents to a personal creditor arresting in the tenants' hands, even though he has not previously poided the ground, or entered into possession by action of maills and duties.³ This is on the principle that the creditor's registered sasine completes his real right, and is also equivalent to intimation to the tenants of the assignation of the maills and duties. And, when a heritable and a personal creditor respectively raise adjudications of the lands for payment of their debts, the heritable creditor will be preferred, because of his prior real right. But the heritable creditor has no preference over the moveables without adopting the requisite steps of diligence; that is, poiding the ground whilst the proprietor is in possession, and sequestration against the tenants after the creditor has entered to possession by action of maills and duties; and, after entering

¹ Earl of Lothian, 11th July 1634, M. 14,087.

² 19 & 20 Vict. c. 79. s. 118.

³ Webster, 13th July 1780, M. 2902.

to possession, the creditor must account for his intromissions. In one case it was held that the creditor must account, without deduction of factor-fee, in a question with postponed creditors, on the ratio that a heritable creditor in possession was to be viewed as a proprietor, and entitled, in accounting with postponed creditors, to no allowance which would not be made to a proprietor levying his own rents.¹ But supposing the case to require the employment of a factor, and a factor to be actually employed, I cannot suppose that the Court would enforce such a rule now, at least on the ratio here given. The creditor is not levying the rents as a proprietor. He is not levying them for his own behoof, but under obligation to account.

**REMOVAL OF
PROPRIETOR IN
POSSESSION.**

The power of removing a proprietor who is in the natural possession of the lands forming the subject of security is a matter of great practical importance. In one case, lands had been sold subject to a reserved real burden, with a declaration that in certain events, which happened, the seller should be entitled to enter to immediate possession. In another event, which also happened, it was declared competent to the seller to revert to his own infeftment in the lands, and, in virtue thereof, to sell the same. These clauses were all engrossed in the purchaser's titles. In these circumstances, the seller obtained decree in a declarator of removing in the Court of Session against the purchaser.² There seems to have been no discussion in the question of removing, which, however, was not an ordinary summary action before the Sheriff, but a declarator in the Court of Session. We have another case, in which decree of removing was obtained by a heritable creditor in the Court of Session, where there was no proper tenant in the subjects of security,—the proprietors being marriage trustees, who were allowing the beneficiary under their trust to possess without payment of rent, in order to defeat the heritable creditor's remedy by maills and duties.³ And in a subsequent case it was found incompetent for a heritable creditor to pursue a summary removing against the proprietor in the natural possession of the subjects of the security, notwithstanding that the bond contained power, in the event which happened, 'to enter into possession of the said subjects, and to appoint a factor, grant tacks or leases, output and input possessors, uplift, receive, and discharge the rents and profits,' etc.⁴ The judgment of the Court in this case was given on the sole ground that a summary action of removing, at the instance of a heritable creditor against a proprietor feudally infeft, was clearly incompetent in the Sheriff-Court. The difficulty of removing a proprietor in possession of the subjects of the security may sometimes be a serious objection to lending money on lands in the natural possession of the borrower. In such cases the direct funds readily available for payment of interest, when lands are held by tenants,—viz., rents,—have no existence. Regularity

¹ Kildonan, 16th June 1785, M. 14,135.

² Blair, 21st Dec. 1853, 16 D. 291.

³ Wilson, 13th Feb. 1822, 1 Sh. 316;
affirmed 15th April 1824, 2 Sh. App. 162.

⁴ M'Farlane, 4th March 1857, 19 D. 623.

in payment of interest cannot be so fully relied on as when there are rents to meet it. And, supposing the sale not to be advisable, there is no remedy short of an action of declarator of removing in the Court of Session. It may thus be frequently of importance, in such cases, to stipulate for a collateral obligation or other security for the regular payment of the interest. Forms for such obligations will be found in the Style Book.¹

Mr. Duff says that heritable creditors in possession can grant leases; and no doubt they can do so as long as they continue in possession. But, if it be meant that a heritable creditor can grant a lease which will subsist after his debt is paid up and discharged, I see no authority for the doctrine, unless it be in the view of the Court in the Kildonan case, that the heritable creditors in possession are to be looked on as the landlords, which I think the Court would hold to a very limited effect only. The creditors' remedy, when the proprietor is not aiding them, is to sell.

I have mentioned that the securities over lands are preferable according to the date of the registration of the sasine or bond, as the case may be; and the principle of giving preference according to priority in point of registration has been rigidly carried out. Thus when two sasines, following on bonds and dispositions in security by the same party over the same lands, were given in to the register by the same agent, and actually at the same time, the sasine first entered in the minute-book and register was held preferable to that which immediately followed.² When, therefore, it is intended that several securities to be created over the same lands by separate bonds and dispositions in security shall be ranked *pari passu* on the lands, the only safe course is to insert a clause in each bond, declaring that they are to be so ranked, whatever may be the order of priority of their registration. You will find two forms for this provision, applicable to circumstances slightly different in detail, in the Style Book;³ and in such cases you will keep in mind that it is generally necessary for the agent of any one of several creditors to see that the clause, which is adopted and inserted in the bond and disposition in security in favour of his own constituent, is duly inserted likewise in all the other bonds which are to be so ranked.

When the bond is granted to trustees, guardians, or others, a clause should be inserted, at the close of the personal obligation, for protecting the debtor, assignees, and others, from all concern with the application of the moneys paid to them.⁴

If the security depends to any extent on house property, provision has to be made for insurance of the houses against fire.⁵ The policy of insurance ought to be in the name of the creditor, who of course must see that the premium for keeping up the insurance is regularly paid. When the bond and disposition in security over house property contains no power to the creditor to insure against fire, a creditor in possession is

PRIORITY OF
REGISTRATION.

INSURANCE
AGAINST FIRE.

¹ Juridical Styles, i. 598 and 608 (4th edit.)

² Douglas, 21st Feb. 1835, 13 Sh. 505.

³ Juridical Styles, i. 601.

⁴ *Ibid.*, 600.

⁵ *Ibid.*, 603-5.

not entitled, in a question of accounting with postponed creditors, to allowance of sums disbursed for fire insurance.¹ It may, however, be clearly for the interest of the postponed creditor, as well as, or even more than, of the preferable creditor, to see that the subjects are insured; and where bonds do not contain power to insure, and the creditor is to enter into possession, he should endeavour to make a proper arrangement with the postponed creditor on that point.

We have been considering the case of ordinary securities granted for money instantly advanced and lent. When securities are given for debts already subsisting, the only difference in form is in the narrative or inductive clause of the bond, which narrates the existence of the debt as the cause of granting. But it will be kept in mind that such securities are liable to be challenged on the Act 1696, cap. 5, if granted within sixty days of the granter's bankruptcy. That Act struck at securities for future debts likewise, declaring null such debts as should be found to be contracted after the sasine or infeftment following on the right. But the Act was held not to strike at the security for sums advanced after the date of the bond, but prior to the date of the sasine.² In another case, sums contracted to be lent, and which were actually advanced from time to time between autumn 1774 and spring 1775, were held to be secured by a bond and sasine for the full sum completed in November 1774, but, it is said, not delivered till after the full advance was made. The sasine, however, appears to have been passed and recorded;—so that there could be no question upon delivery.³

**CASH-CREDIT
BOND.**

And there are various modes in which securities for future debts can be validly created. Of these I notice—(1.) The cash-credit bond. The nature of the transaction, or course of transactions, which the bond is intended to represent, was explained when we were on the subject of personal bonds;⁴ and I then noticed also the peculiarities requiring attention when such bonds were granted by or to trading companies. The debt in these cases is future, and as such would be struck at by the Act of 1696. But objection on that ground, in the case of sums paid or balances arising upon cash accounts or credits, or by way of relief to cautioners or others who might become bound with the proper debtor for the payment of such sums or balances, is removed by the Act 19 & 20 Vict. cap. 91, sect. 7, renewing a former Act which had been repealed;⁵ the principal and interest which might become due upon such cash accounts or credits being always limited to a definite sum, not exceeding the amount of the principal sum of the credit, and three years' interest thereon, at the rate of five per cent. The above Act, which was passed

¹ Pollock, 12th July 1859, 21 D. 1210.

² Pickering, 16th Jan. 1783, M. 1155; Stein's Creditors, 14th Nov. 1789, M. 1158; Brough's Creditors, 2d March 1791, M. 1159.

³ Dunbar's Creditors, 30th July 1789, M. 1156.

⁴ See *ante*, p. 253, *et seq.*

⁵ 54 Geo. III. c. 137.

in 1856 (overlooking the change in the form of securities introduced by the Heritable Securities Act of 1847), spoke of securities constituted by deeds in the old form. But by the Act 20 & 21 Vict. cap. 19, sect. 8, the provisions of the Securities Acts of 1847 and 1854 are declared to apply to the heritable securities authorized by the Act of 1856. The short form introduced by the Act of 1847 may therefore be adopted in reference to cash-credit bonds; and you will find forms for it in the *Style Book*.¹ The specification of the principal sum, with 'three years' interest thereon at the rate of five per cent.,' was held to satisfy the Statute as regards the specification of the limit to which the security might extend.² The power of redemption should be available at any time, and 'without premonition.'

(2.) A heritable security for a future debt may also be constituted in the form of an absolute disposition qualified by a back-bond or other writing; which form is available also, and the only form available, when the debt is of uncertain or indefinite amount. In such cases, the debtor grants the creditor an absolute disposition, whereby, 'for certain good causes and considerations,' he sells and disposes to the creditor the lands in ordinary form; and the deed contains all the usual clauses of a disposition granted for onerous causes, including a procuratory or clause of resignation if the lands are held by feudal tenure. The creditor registers the disposition with warrant, or is infeft thereon; or he expedes a notarial instrument, if such a mode of procedure be competent; and he grants a back-bond or other writing acknowledging that, though the deed is absolute in form, it is only to be held in security of the advances to be made (or as the case may be), and engaging, when the advances are repaid (or as the case may be), to reconvey the lands to the debtor at his expense, with warrandice from fact and deed. Such a back-bond is clearly within the terms of the Statute 1696, cap. 25; but the strong words of that Act, that a declaration or back-bond of trust is to be 'lawfully subscribed by the person alleged to be the trustee,' do not imply that a probative deed is necessary; on the contrary, 'a trust may be competently proved by writings under the hand of the party, importing an admission or acknowledgment of a trust; as, for instance, by a holograph writing signed by him, or by a writing to which his signature is adhibited, if its authenticity is not disputed, or shall be instructed. And not only so, but the fact of the existence of a trust may also be competently established by the tenor of several writings taken together; and this although there may, in terms, be no positive declaration of trust, or direct expressions of that import. But then, while that latitude has been allowed, it has never been so, except with the restriction and limitation (and a most necessary one) that the contents of the writings shall, although not in direct words, amount to an unambiguous acknowledgment of the existence of a trust, or shall be such

¹ Juridical Styles, i. 618 & 621.

affirmed 26th Nov. 1830, 4 Wil. & Sh.

² Morton, 10th Dec. 1828, 7 Sh. 172; App. 379.

BACK-BOND.

'as not to be capable of being explained in any other way than as an admission that the party holds in trust. They must be perfectly unequivocal.'¹

Securities by absolute disposition, qualified by back-bond, are good to the extent of the value of the subjects, for any debt to be incurred, whether before or after the registration of the disposition, or instrument of sasine, or notarial instrument.² And the security is not limited to the debt or sum specified in the back-bond, but will cover all sums due by the owner of the lands to the granter of the back-bond.³ But, if the back-bond has the necessary clause of registration, it can be recorded in the register of sasines for publication; and, if so recorded, the right under the absolute disposition will become qualified as of the date of registering the back-bond; in which case the security will apparently stand good only for such sums as were advanced prior to the date of recording the back-bond.⁴ The same result apparently would follow the judicial production of the back-bond, or judicial demand for a reconveyance in terms of it. On account of the risk of limiting the security thus attending the execution of a formal back-bond, it is not uncommon for banks, in dealing with securities of this nature, to grant no back-bond. The nature of the transaction with their debtor appears in the directors' minute-books, or can be otherwise proved if necessary; and the bank thus remains safe against registration. And, even when back-bonds are granted, they often remain in the creditor's custody for the same reason. When, however, the absolute disposition is of proper feudal subjects, and has been registered or followed by infeftment, the creditor, notwithstanding an unrecorded back-bond, is personally bound to the superior, though not actually entered as his vassal, to fulfil all the conditions of the feu-right conceived in favour of the superior, who is not concerned with the latent back-bond.⁵

These are risks affecting the disponent. On the other hand, the qualification of the conveyance can be established only by the writ or oath of the holder.⁶ The cases cited will show the risk affecting the disponent, viz., that his disponent in trust may claim to be absolute proprietor. On this subject Professor Bell remarks,⁷ 'It will not appear surprising that such a security should not have been adopted into common use, when it is considered how unwilling any proprietor must be to grant an absolute conveyance of his estate, by which he must cease to appear in the world as proprietor of it, and, being unprotected by the Acts 1469 and 1617, must leave it in his creditor's power to convey his estate away from him for ever.' These considerations, no doubt,

¹ Opinion of Lord Wood in Seth's case, *infra*.

² Riddell, 16th Feb. 1782, M. 1154; James, 15th Nov. 1836, 15 Sh. 12.

³ Maitland, 23d Nov. 1827, 6 Sh. 109; Russell, 18th June 1829, 7 Sh. 767; affirmed 4th April 1831, 5 Wil. & Sh.

App. 256; Tierney, 16th June 1832, 10 Sh. 664.

⁴ Bell's Comm. i. 684; Keith, 8th July 1795, M. 1163.

⁵ Clark, 20th June 1850, 12 D. 1047.

⁶ 1696, c. 25; Knox, 12 Feb. 1850, 12 D. 719; Seth, 14th July 1855, 17 D. 1117.

⁷ Bell's Comm. i. 672.

have operated to make this form of security rare, except in transactions with bankers.

Another case in which the security has to reach something like a future debt occurs when a loan is to be made as certain works progress,—the building or finishing of a house, for example; or as debts forming burdens on the lands are cleared off. In these cases, the proper course is to advance the full sum on execution and delivery of the bond, and to deposit in bank, in the joint names of borrower and lender, such portion of the amount as is not at once to be placed in the debtor's hands. The parties will at the same time enter into a probative minute, stating what has been done, and explaining on what conditions the deposited sum is to be uplifted and paid over to the borrower. In this way the lender gets his security completed at once. The money, so far as not at once advanced to the debtor, is made ready for him on his fulfilling the stipulated conditions. He pays interest on the full amount of the loan, receiving the banker's interest on the deposited money; and no risk of question as to future loan arises. A plan of this nature was adopted for the security of the lender of money over houses in Glasgow in the course of erection, as appears from a recent case.¹

The risk of proceeding in a different way will be seen by reference to a case² referred to when we were on the subject of the delivery of deeds, and to another very similar case.³ In both cases the same party acted as agent for borrower and lender, which was in a great measure the cause of the irregularities and loss which arose.

Bonds of relief and dispositions in security do not appear to require much remark. The form, however, given in the Style Book⁴ is defective, as containing an obligation on the debtor to pay the amount of the debt to his cautioner or co-obligant contingently only on failure to pay to the principal creditor, and not absolutely. Having noticed that point particularly on a former occasion,⁵ I need only here put you on your guard in reference to it, as connected with heritable securities for relief of personal obligations.

The power of redemption should, of course, be available at any time on payment of the principal debt, and without premonition to the cautioner; and the power of sale should be 'on default in relieving the said 'B. (cautioner) and his foresaids as aforesaid, or in making payment to 'the cautioner himself, so that he may operate his relief.' And there should be right to exercise this power on previous intimation or requisition for relief as aforesaid, or for payment as aforesaid, according to the form and in the manner prescribed by the Act of 1847 in reference to the sale of lands contained in bonds and dispositions in security, on default in payment of the sums contained in such bonds and dispositions in security, or as near thereto as may be.

¹ City of Glasgow Bank, 5th March 1862, 24 D. 703.

² Mair & Sons, 20th Feb. 1850, 12 D. 748. See *ante*, p. 97.

³ Mackintosh, 16th Dec. 1851, 14 D. 187.

⁴ Juridical Styles, i. 654.

⁵ See *ante*, p. 270.

BONDS OF
ANNUITY.

Bonds of annuity and dispositions in security, without power of sale, are deeds of so simple a character as to call for no observation. When a power of sale is stipulated for, it may be to take effect on failure in payment of one or more terms' payments of the annuity; and there may be an obligation to account for the price after deducting all arrears of the annuity, with interest and penalty, so far as incurred, and also such a sum as shall be expended in the purchase of a corresponding annuity from Government, or from any well-established assurance company,—the sum payable to such company never exceeding the Government price,—and the payment therefor, out of the price of the lands sold, operating a discharge of the obligation for payment of the annuity contained in the bond.¹ If, as is commonly the case, the annuitant effects an assurance on the life of the debtor, with a view to the recovery of the price paid for the annuity as at the time when the annuity will cease to be payable, it may be advisable to make the annuity payable for three or six months after the debtor's death, because the sum assured will not be payable until such period has elapsed.

HEIR OF
ENTAIL.

The only other security to which I shall direct your attention is that by the proprietor of an entailed estate over his interest in the estate, conjoined with policies of assurance on his life; or by the heir-apparent over his prospective interest, conjoined with assurance policies. The policies form the source out of which the capital sum lent will be repaid at the debtor's death. In the case of the heir in possession, the rents of the estate, and in that of the heir-apparent such rents, with some other interim fund available until the succession to the estate opens to him, will afford the security for the interest and premiums of assurance during the life of the granters respectively.² The leading peculiarity of the bond, in both cases, arises from this, that assurance policies may be forfeited and have to be renewed, or extra premiums of assurance may have to be paid for foreign residence, war risk, or other causes; and it is uncertain what sums may become payable on these accounts. As a security for an indefinite amount cannot competently be created over lands by bond and disposition in security, the mode of proceeding is to take an obligation for payment of such an annual sum as will certainly cover the amount of the extra payments required in any of these contingencies, and to declare that the creditor shall account therefor and pay over to the debtor the surplus, if any, remaining in his hands after satisfying the extra payments.

The deed will also contain the proper clause qualifying the conveyance of the interest in the entailed estate, so as not to infer a contravention of the entail and forfeiture of the debtor's right. A form containing these clauses will be found in the Style Book.³ I apprehend,

¹ Such an arrangement was made, and the power of sale was allowed effect, in *Dunlop*, 19th Jan. 1821, F. C.; and *Hume*, 666. See also *Hamilton*, 22d May 1823, 2 Sh. 324.

² A form for this deed will be found in the Style Book, i. 643, with corresponding *pari passu* preference clauses if required, 650.

³ Style Book, i. 643.

however, that in case of the debtor's death before payment of the debt, the creditor is bound, according to that form, to take payment as soon as the sum in the policy of assurance becomes payable, even though that should be between the two terms of Whitsunday and Martinmas; and I think the bond should be so framed as to entitle the creditor to decline payment until one of these terms arrives, or at least to have the amount of the interest at the current rate made up to him until the term arrives.

When the security is by an heir-apparent, the form of the deed will be very much the same as when by an heir in possession. Provision will of course have to be made for security of the interest and premiums, from some source other than the rents of the entailed estate, until the heir's right to these rents becomes actually available. And, moreover, as the heir in possession may during his possession burden the estate, or particular portions of it, with debts for improvements or otherwise, or with provisions to his wife, it would not in general be safe to take the security for the loan to the apparent heir, though but of a moderate amount, over a portion only of the estate. It ought to be a catholic security; but it can be provided that the creditor, on obtaining indefeasibly a first security over a portion of the estate of a certain specified yearly value, shall be bound to release the remainder.

Before proceeding to the subject of the transmission of heritable securities, I may again notice that it may be of importance—in cases where securities extend over ground likely to be feued, or disposed under the burden of ground-annuals, or leased for building purposes—to reserve power to the debtor to grant feus, ground-annual rights, or leases, at a minimum rate of feu-duty, ground-annual, or rent, free of the security constituted by the bond; such security affecting only the feu-duty, or ground-annual, or rent, and casualties. Such a reservation in the bond will save the necessity of afterwards obtaining a deed of restriction, from the creditor, of his security as affecting the lands feued, leased, etc. And, as the transactions contemplated will improve the security, the lender has no interest to object to the reservation. Such reservation is specially important in the case of securities for irredeemable annuities. In the case of redeemable rights, the debtor can pay up the debt, and make a new arrangement with the new creditor. But with one whose right is irredeemable there is no such remedy.¹

Bonds and dispositions in security in the old form, whether affecting feudal or burgage subjects, were framed, in so far as regarded the conveyances of lands contained in them, according to the same rules as absolute dispositions. It was equally necessary in regard to them, as in the case of absolute dispositions, to use the word 'dispone;' and the deeds contained the executive clauses of obligation to infest, procuratory of resignation, and, as to feudal subjects, precept of sasine. And in order

¹ A form which can be adapted to the case in hand will be found in the Style Book, vol. i. p. 741, *et seq.*

to complete the security they were intended to constitute, sasine had to be expedite on them with the same formalities as in the case of absolute and irredeemable rights.

A me HOLDING

Further, if the obligation to infeft contained in the bond and disposition in security was *a me* only, and not *de me*, or alternatively *a me vel de me*, the security was not feudally complete until the bond and disposition in security and sasine thereon were duly confirmed by the debtor's superior; and where successive bonds and dispositions in security were granted over the same subjects, with obligations to infeft *a me* only, the creditor whose right was first confirmed by the superior became the preferable claimant on the lands, though he might have been last infeft.¹ The creditor whose title was defective, for want of confirmation, was excluded by the trustee in a sequestration who first completed a feudal title,² and by a posterior creditor holding a bond and disposition in security, with *a me vel de me* holding, completed by infeftment.³

And when the debtor's own title consisted of a disposition with *a me* holding only, and sasine thereon unconfirmed, an *a me* infeftment granted by him to a creditor (though such latter infeftment should itself be separately confirmed by the debtor's superior) would nevertheless remain inept so long as the debtor's own sasine remained unconfirmed. But, supposing that the debtor's own sasine should thereafter be confirmed, the confirmation thereof would immediately operate to make good the superior's prior confirmation of the *a me* infeftment which the debtor had granted to his creditor. The following is an actual case on this point. A, the proprietor of lands, was infeft *a me* without confirmation. He granted successive bonds and dispositions in security, first to B, and thereafter to C, with *a me* holdings only; and B. and C. were severally infeft. B. obtained confirmation of his own infeftment, and nothing more, leaving A's infeftment still unconfirmed. C. afterwards obtained confirmation not only of his own infeftment, but also of A's infeftment, and he then claimed as the first who had obtained a complete title. But the confirmation of A's infeftment, though obtained by C., was a good confirmation of that infeftment; and it was found to operate by accretion so as to be available to B., in the same manner as if B. himself had obtained the confirmation of A's infeftment and his own infeftment at the same time. The completion of A's title, though accomplished by C., was thus made available to B. who was thereby made the holder of a real right which was prior in date, and therefore preferable, to the real right of C.⁴

Although we have now a statutory form for the bond and disposition in security, the use of which obviates the risk of error in framing new securities, we have still to see that securities in the old form have been

¹ Struthers, 2d Feb. 1826, 4 Sh. 418; affirmed 28th May 1827, 2 Wil. & Sh. App. 563.

² Peebles, 9th Dec. 1825, 4 Sh. 290.

³ Rowand, 30th June 1824, 3 Sh. 197.

⁴ Henderson, 5th July 1821, 1 Sh. 104. The principle of this decision is stated in Stair, ii. 3. 28; and Erskine, ii. 7. 15.

confirmed by the superior when confirmation is required ; and we have also to see that the titles of the debtor are duly confirmed when he is infest *a me* only. This is a matter in which agents most properly are personally as well as professionally interested. In two reported cases, the agent who failed to complete the securities was found personally liable to make good the consequences to his client.¹

I may notice with reference to the case of Henderson, in order the better to illustrate the system of titles, that there was a way in which C. could have proceeded so as to obtain a preference over B, notwithstanding the confirmation of B's infestment. A., the debtor, had a procuratory of resignation in the disposition in his favour ; and we have seen that executive clauses, with a view to an absolute infestment, can be made use of for an infestment in security. C. had an assignation to writs in his bond ; and he might have gone to the superior, and, in place of asking for a charter of confirmation of his own and of A's infestments, he might have obtained a charter of resignation proceeding on the procuratory in favour of A., and the assignation to writs contained in his bond to C. Infestment on this charter would have carried the full fee of the lands to C. in security of his debt, unaffected by the infestment in favour of A., which was unavailing until confirmed, and unaffected by the infestment in favour of B., which, though confirmed, was of no avail without the confirmation of A's infestment. And, moreover, the superior, by granting the charter of resignation to C., would have precluded himself from granting any confirmation either to A. or B. which could have interfered with the completed right which he had granted to C. It is comforting to see that questions such as those we are now considering have not been before the Court for a considerable time.

As regards searches for incumbrances affecting the lands to be burdened, the same care is necessary in connexion with bonds and dispositions in security as in the case of absolute dispositions, and the same records have to be searched. An agent who omits to obtain the requisite searches is personally liable to his constituent for loss arising through a preferable security, which a search would have disclosed.²

SEARCHES.

CHAPTER II.

I NOW proceed to the deeds of transmission of bonds and dispositions in security, and similar writings. Before the passing of the Conveyancing Acts of 1845, such deeds were constructed strictly on the rules applicable to the conveyances of feudal or burgage subjects. The debts

TRANSMISSION
OF SECURITIES.

¹ See Struthers' case ; and Rowand, 6th July 1827, 5 Sh. 903 ; affirmed 14th July

1830, 4 Wil. & Sh. App. 177.

² Graham, 4th March 1831, 9 Sh. 543.

were assigned, or the new creditor was constituted cessioner and assignee thereto; and the lands were disposed in security, with obligation to infeft, and other executive clauses. Infeftment was necessary to complete the assignee's title, and confirmation from the superior in feudal subjects if the holding was *a me* only. The titles of heirs and general disponees also had to be completed by charter or precept of *clare constat* and sasine; or by adjudication in implement and charter and sasine; or sasine, or resignation and sasine without charter, in the case of burgage subjects, —just as if the lands had been held by absolute and irredeemable title.¹ I do not think it necessary to examine these writings here.

The Act of 1845 supplied forms of transfer to new creditors, heirs, general disponees, and adjudgers, in all cases where the cedent or predecessor was himself infeft; and, the Act of 1847 having declared registration of bonds and dispositions in security (framed in the terms thereby authorized) to be equivalent to infeftment, the forms of the Act of 1845 are applicable to all securities in the new form which were completed by registration during the lifetime of the grantee.

ASSIGNATION
OF SECURITY.

The Act of 1845 supplies the form of an assignation of an entire security to a new creditor. That form contains an acknowledgment of the receipt of the consideration-money for which the assignation is granted; but the form does not say from whom, nor does it give any destination to heirs or others in the dispositive clause. When the money is advanced out of any particular fund, it may be of importance to specify it; and certainly, if an heir of entail is paying a debt affecting the entailed estate upon assignation, the deed in his favour should express that the amount is advanced from his own private funds, and should contain a destination to him and his heirs and assignees whosoever, or other destination, to exclude the heirs of entail as such. The appropriate destination will also be inserted when the debt is to be vested in trustees, judicial factors, or others holding offices or the like.

Though part only of a debt is assigned, the whole lands have to be disposed in security; and it is usual in such cases, though perhaps not always necessary, to introduce in the assignation a clause of *pari passu* preference between the cedent and the assignee, or between two or more assignees.² In these cases also, and some others, provision ought to be made as to the custody and exhibition of the writs of the security, regarding which the statutory form of deed says nothing.

Sometimes the bond and disposition in security for a cash-credit has to be assigned, not as a security to be operated on as it was while held by the original creditor, but to stand as a permanent loan of the amount of the balance due at the time of the transfer. In such cases the balance should be ascertained in manner pointed out in the bond, and should be acknowledged by the debtor to be correct. This will be best

¹ Examples of the deeds in use, as applicable to different circumstances, will be found in the Style Book, i. 679, *et seq.*

² A form for this will be found in the Style Book, i. 678.

done by a certificate indorsed on the assignation, and duly authenticated. ASSIGNATIONS.
It is probable also that premonition of payment will be stipulated for by the new creditor; and, if so, there should be a separate agreement on that point registered in the General or Particular or Burgh Register of Sasines, as the case may require; or the new arrangements may be expressed in a bond of corroboration and disposition in security.

In some cases assignations must be regarded as deeds granted on the STAMP-DUTY.
sale of the obligation or right assigned,—for instance, the assignation of a bond of irredeemable annuity, or of a bond of annual-rent, over an entailed estate, granted for a capital sum paid down. In these cases the *ad valorem* conveyance stamp-duty appears to attach. The assignation of a redeemable bond of annuity is liable only in the stamp-duty chargeable on the assignation of a bond for the amount of the redemption-money.¹

In reference to the assignation of a bond and disposition in security over lands which have been sold, when such deed is to be granted by the creditor in favour of the purchaser as a collateral security of his purchase, I refer you to the case of Russell,² in the special circumstances of which it was found, that the warrandice to be granted should be of the import of that appropriate to the warrandice of a discharge on payment; viz., that the money had been actually advanced at the date of the bond, and had not been repaid to the cedent who was the original grantee of the bond.

The heirs of parties infest in lands in security of debts, or whose bonds have been duly registered, can complete their titles by writ of acknowledgment from the person of whom the security is held, according to a simple form provided in the Act of 1845. When the party deceased was infest on an original bond and disposition in security with *de me* holding, or with *a me vel de me* holding unconfirmed, it is clear that the security is held of the debtor, and he is the proper person to grant the writ. When, again, the bond and disposition in security and sasine thereon have been confirmed by the debtor's superior, such superior should grant the writ. In cases where the creditor was infest, not on the original bond, or on a deed which has been confirmed by the debtor's superior, but on a disposition and assignation from the original creditor, with an obligation to infest *a me vel de me*, not confirmed by the debtor, the debtor is not, strictly speaking, the superior of whom the security is held; and it may be doubted whether, in that case, a title can be made up by writ of acknowledgment from the debtor. Those who think there is ground for such doubt can make up the heir's title either in the old form, by charter of confirmation and precept of *clare constat*, which can be registered in terms of the Titles Act of 1858; or by simple writ of *clare constat*, in virtue of that Act, sect. 11; or by general service and notarial instrument, in terms of the Act of 1845. The service or

¹ Scottish Union Insurance Company, 30th June 1838, 16 Sh. 1241; 5 & 6 Vict. c. 82, s. 2.

² Russell, 28th Nov. 1857, 20 D. 125.

**COMPLETION OF
HEIR'S TITLE.** precept or writ of *clare constat* will be in the proper character, according to the destination contained in the titles of the deceased; and for the notarial instrument forms will be found in the Style Book.¹

The general disponee of a creditor duly infeft or registered may also make up his title by notarial instrument. This was clearly provided by the Act of 1845, in the case where the creditor was deceased.

It may happen that the bond and security was held by two or more parties jointly and *pro indiviso*, and that the heir or general disponee of one of these parties is making up his title to the share of the debt which was held by his author. In such case the writ will show that the heir or disponee has right only to a share of the debt, but it will contain the whole lands,—not merely a *pro indiviso* or other share thereof. The security for each share or portion of the debt extends over the whole lands; and the creditor on receiving payment of his share of the debt must be placed *in titulo* to release or convey the whole lands.

It was questioned whether the Act of 1845 extended to the case of a general disponee under a deed *inter vivos*. I rather think that the Act did apply to all *bond fide* general disponees. But the case of general disponees by deed *inter vivos* is now provided for by the Titles Acts of 1858, sect. 12, and 1860, sect. 8, which place all general disponees on the same footing as regards the power to make up titles by notarial instrument.

Adjudgers, as I have mentioned, formerly had to expedite charter and sasine of feudal subjects, and sasine or resignation and sasine of burghage subjects. Now, by the Act of 1845, sect. 3, the registration of the abbreviate of their adjudication in the General or Particular or Burgh Register of Sasines completes the heir title.

The only other case requiring notice is that of assignations of securities contained in deeds 'granted for further purposes and objects, or 'conveying other properties,—such as marriage-contracts, deeds of trust 'or settlement,'—in which cases, by sect. 1 of the Act of 1845, it is not necessary to record the whole of the deed; but it is sufficient to put on record a notarial instrument, setting forth generally the nature of the deed of conveyance, and containing at length the part of such deed which relates to and conveys the security in question. The assignations in the new form, or other writs authorized by the Act of 1845, must be registered in the proper register of sasines; and, on being so registered, the Act (sect. 1) declares the security transferred to the assignee as effectually as if it had been disposed and assigned, and the disposition and assignation or conveyance had been followed by sasine duly recorded, according to the former law and practice; and the disponee or assignee is thereupon to be held fully entered, as if he had obtained a renewal of the investiture in his favour, according to the law and practice in use before the passing of the Act.

Supposing the creditor not to have been infeft, the old forms can be resorted to. The heir will expedite decree of general service, and he can

**CREDITOR
NOT INFEST.**

¹ Juridical Styles, vol. i. p. 704.

pass infestment on the bond or disposition and assignation in favour of his predecessor, and on the service; the disponent can pass infestment on the deed in favour of his author, and his author's disposition; or the forms introduced by the Titles Acts of 1858, sect. 14, and 1860, sect. 10, can be made use of, care being taken in such case, if the bond or assignation in favour of the ancestor or cedent is to be registered, to write a warrant of registration upon it. Supposing that a disposition and assignation in the new form has been granted and delivered, but not recorded during the lifetime of the grantee, it cannot be recorded afterwards to the effect of making his title complete. If it relates to a security over ordinary feudal subjects, the heir or disponent can make use of it along with his decree of service or disposition, as connecting links, and obtain himself infest, as in the case of a bond and disposition in security in the new form not registered during the grantee's lifetime (sect. 3 of the Act of 1854);¹ or he can proceed under sect. 14 of the Titles Act of 1858. If it relates to burgage subjects, neither the Act of 1854 nor the Titles Act of 1858 applies; but by the Titles Act of 1860, sect. 10, the heir can make up his title by notarial instrument.

It is to be kept in view, however, that the debt is the principal, and the security (though constituted with all the feudal formalities) only accessory; and, even if the security appears undischarged, it still may prove unavailing—in case, for example, the debt is extinguished *confusione*, or by intromission, or otherwise. And there are, or may be, two parties concerned in this question, besides the cedent and assignee, viz., the debtor and postponed creditors. Possibly the debtor may tender a statement or acknowledgment that the debt still is and always has been due. But if the debt be legally extinguished, such statement would found no more than a personal claim of debt against the debtor. The security for payment would not go along with it, even as against the debtor's own future contractions. To protect against them, it would be necessary to obtain a bond of corroboration and disposition in security. But that again might not be entitled to the same preference as the original bond; and, supposing postponed debts to exist, the security by the bond of corroboration would be ranked after them, according to the date of its own registration.

The assignation of a bond and disposition in security on which adjudication has been led, though gratuitous, and taking no notice of the adjudication, nor containing any general conveyance of all that had followed on the bond, has been held to convey the adjudication, as one of, and not separable from, the other vouchers and instructions of the debt.² The assignee can point the ground, though his right is only personal, supposing the right of the original bondholder to have been duly made real.³ And a postponed creditor has no interest in objecting to the

¹ 17 & 18 Vict. c. 62.

² Wilson, 28th Feb. 1751, M. 40, 41.

³ Tweedie, 22d January 1836, 14 Sh.

337.

formality of the titles in the person of the assignee, so long as he can say nothing against the title of the cedent.¹

**EXTINCTION OF
SECURITIES.**

We now come to the subject of the discharges of bonds and dispositions in security. In old times, so great was the tendency to follow the feudal rules, even in connexion with redeemable rights, that we occasionally find bonds and dispositions in security, which had been constituted to be holden of the debtor, extinguished by resignation *ad remanentiam*, as by a vassal to his superior. By-and-bye renunciations came to be allowed the full effect of extinguishing the security, even when granted voluntarily, as they had previously been when granted judicially. And a short form of simple discharge, by the creditor infest or registered, is made sufficient in all cases by the Act of 1845.

It may, in some cases, be proper to preserve evidence of the source or fund out of which a debt is paid and satisfied. The importance of this will be found on reference to the case of Cleghorn.² It is therefore advisable, in paying off debts of the nature of those to which that case related, that the discharge should express the fund out of which the payment is made, or that some other evidence as to that matter should be preserved.

STAMP-DUTY.

When an annual-rent right, an irredeemable security, or a liferent right, is discharged in consideration of a price or capital sum paid down, the transaction is of the nature of a sale, and an *ad valorem* conveyance stamp is required;—but not if the annuity is redeemable; in that case the stamp is the same as in the case of the discharge of a bond granted for the amount of the redemption-money.

**RESTRICTION OF
SECURITIES.**

We have sometimes deeds of restriction of securities, whereby the security over part of the subjects in the bond is given up, that over the remainder being reserved. The point mainly to be kept in view, in framing deeds in such cases, is to show distinctly what lands are released and what are to remain burdened. But when the creditor afterwards grants an assignation of the debt and security, the deed of restriction should be excepted from the warrandice.

Bonds and dispositions in security may be assigned in security to creditors of the creditor; and, in such cases, a discharge afterwards granted by the creditor-assignee in favour of the creditor-cedent operates re-investment of the creditor-cedent. A retrocession is not indispensable for that purpose.³

**INHIBITION
AGAINST
CREDITOR.**

In connexion with this subject, I have only further to notice the effect of an inhibition when used against the creditor in a heritable bond. Supposing the bond to have been followed by infestment, or its

¹ Proctor, 29th June 1837, 15 Sh. 1219.

² Cleghorn, 18th Jan. 1833, 11 Sh. 259; continuation, 31st Jan. 1837, 3 D.

¹; affirmed 27th August 1839, M'Lean & Robinson's App. 1033.

³ Mackenzie, 23d December 1837, 16 Sh. 311.

equivalent, the inhibition would clearly prevent the creditor from voluntarily assigning the debt so as to prejudice the inhibitor. But as regards the debtor the case is special. The inhibitor ought not to lose the benefit of his diligence ; and at the same time the debtor ought not to be prevented by the inhibition, to which he is no party, from redeeming his lands. In order to place the interests of all concerned on a right footing in this matter, the Act of Sederunt, 19th February 1680, provides that if the inhibitor shall make notarial intimation of the inhibition to the debtor, producing the registered inhibition in presence of the party and notary, the Lords, in respect of the intimation, will not sustain renunciations, though upon true payment, as not being made *bond fide*, unless the redemption proceed by way of action, the inhibitor being cited thereto, or by suspension of double poindings, upon consignment of the redemption moneys. This then gives a sure remedy to the inhibitor against the debtor in the heritable bond, as well as against third parties. But no debtor having private knowledge of an inhibition ought to pay in contravention of it, even if notarial intimation of it has not been made to him.

TITLE VIII.

REAL DILIGENCE.

WE have seen that lands can be sold judicially at the instance of heritable creditors when they are burdened with debt beyond their value ; and that under the process of sequestration a very speedy mode of realizing estate for behoof of the creditors upon it can be resorted to. We are now to consider certain proceedings available to creditors, and which, though not intended to bring about the conversion of land into money, are very effective in the way of improving the security and position of a creditor, and to a certain extent in realizing his debtor's means for his direct behoof.

INHIBITION.

I take first the Inhibition, which, as its name imports, is a preventive diligence, whereby a creditor may prohibit his debtor from alienating or burdening his heritable estate to the creditor's prejudice. Inhibition may proceed on any liquid ground of debt,—for example, a bond, bill, or decree. Its warrant may also be a depending action, as soon as the summons has been executed ; and the inhibition may be at the instance of the defender as well as of the pursuer of the action. In special cases, it may be raised on account of a future debt, of which the term of payment has not come. In such cases it is in security only.

In the ordinary case, after reciting the bond or other warrant, the letters of inhibition go on to say that the debtor intends, unless prevented, to dilapidate and put away his lands to the prejudice of the creditor. When for a future debt, the bond or other warrant is recited, and it is then said that the debtor is squandering his estate and *vergens ad inopiam*. In both cases, after these slightly varying preambles, the letters, which run in the Sovereign's name, require messengers-at-arms to inhibit the debtor from disposing or burdening his lands, or contracting debt, to the creditor's prejudice ; and to inhibit the lieges from contracting with the debtor, with certification that if they do in the contrary all alienations, contracts, etc., shall be null. There is then an order to record the letters and executions within forty days, conform to Act of Parliament. The writ passes the Signet, and must be signed by a Writer to the Signet. It must be executed against the debtor personally, or otherwise, as explained formerly in reference to other dili-

gences;¹ and thereafter it must be published against the lieges edictally at the head burgh of the shire within which the debtor has his domicile, or, if he is domiciled furth of Scotland, at the Record Office of Edictal Citations, in terms of the Court of Session Act.² It being doubtful whether in this case the old mode of publication, when the domicile is furth of Scotland, has been superseded, it is recommended, as a measure of security, that in such cases there ought also to be publication at the market cross of Edinburgh, and pier and shore of Leith.³ When the debtor is domiciled within Scotland, the publication against the lieges must take place at the head burgh of the county of his domicile, whether the execution against the debtor himself takes place at his residence or not;⁴ and publication at the head burgh of a county where the debtor is residing for the time, but has not acquired a legal domicile, is invalid.⁵ In cases of doubtful domicile, the safe course is to publish at two or more head burghs.⁶

The inhibition and executions must not only be executed against the debtor, and published against the lieges, but also registered in each of the Particular Registers of Inhibitions where the debtor's lands lie, and where the debtor has his domicile; or in the General Register of Inhibitions at Edinburgh.⁷ Registration in the particular register applicable to the lands will not supersede registration in the particular register applicable to the domicile if different; and you will observe that, in regard to this particular proceeding, publication means execution against the lieges, not registration. The registration must take place within forty days after the publication and execution; and, when there is registration within that period, the effect of the executions draws back to the date of the execution, even against third parties, because the execution is held to create litigiousity. This is a very awkward state of the law; and apparently the only way of obtaining the assurance that there is no inhibition executed, though unregistered, is to make a search at the Signet Office in Edinburgh for such diligences. The books there contain a list of all the letters of diligence passing the Signet; and, as inhibitions are passed on a bill or petition to the Lords of Session, and Bill-Chamber fiat thereon,—which is kept at the Signet Office as the keeper's warrant for the letters,—it can be ascertained by the search here proposed whether any inhibition has been issued. The search, I apprehend, should extend over twelve months, as the warrant to charge is good for that period, and the letters, though executed within forty days, may have been issued at an earlier date. If registration does not take place within forty days, the effect of the execution and publication as creating litigiousity is wholly gone.

In the case of inhibitions, as of other diligences, the text of the letters, executions, and service copy, as also the register, must be free of

¹ See *ante*, Br. II. Tit. viii. chap. 2.

² 13 & 14 Vict. c. 36, s. 22.

³ See the Style Book, iii. 528; Menzies, p. 871.

⁴ Kinminnity, 2d Dec. 1748, M. 6982.

⁵ Low, 10th March 1815, F. C.

⁶ Peirse, 1st Feb. 1793, M. 3721.

⁷ 1581, c. 119; 1600, c. 13.

INHIBITION.

material erasure or other vitiation. When parties are furth of Scotland there must be express warrant to cite at the Office of Edictal Citations; and, where the words 'Office of Edictal Citations' in that warrant were written on erasure, the vitiation was held fatal.¹ Where the service copy, or execution against the debtor, misdescribed one of the documents on which the diligence proceeded, the inhibition was found ineffectual as regarded the debt in that document, although, in the letters and executions written thereon, there was no error.² Material errors occurring in the registration have been found fatal in several cases. In that of Park,³ the names of two out of three parties inhibited were omitted in the entry of the letters in the minute-book; and the diligence was found inept as to them. When the Christian name of one of several co-obligants was written 'James' instead of 'David,' the error was found fatal, though the letters were not executed against the party misnamed.⁴ Where the sum was stated incorrectly, the diligence was held not duly recorded, and therefore abortive.⁵

REACHES
acquirenda.

Inhibition reaches not only the heritable estate belonging to the debtor at the time the diligence is raised, but also heritable estate afterwards acquired, supposing always that the letters are registered so as to cover what is acquired.⁶ Formerly it applied to moveable property as well as heritable; now it reaches heritable only. But it strikes only against voluntary deeds to be done by the debtor in prejudice of the creditor; and accordingly the debtor can fulfil any obligations fully contracted by him prior to execution of the inhibition;—for example, he can validly dispoise lands sold before the execution. A prior creditor also can attach the debtor's lands (notwithstanding the inhibition) by adjudication.

As regards the effect of inhibition against the holder of a heritable security, I have just spoken in connexion with such securities.⁷

The inhibition is personal to the debtor, and does not prevent his heir from alienating; and on that account it is not in all respects a proper real diligence; but it can of course be renewed against the heir. It is, moreover, simply prohibitory, giving no direct or active right in the debtor's property. In order to secure such right, the creditor must lead an adjudication; and he may thereby acquire a preference over prior personal creditors, which the inhibition alone does not give him. It only protects him against future contractions by the debtor. But the inhibition itself may give the creditor a most important position and preference in competitions. Whilst prior personal creditors can be excluded by subsequent heritable securities, the inhibiting creditor is preferable to all such, even if the heritable creditors should go unpaid.

¹ Burleigh, 20th July 1848, 10 D. 1512. The whole Court were consulted and were unanimous.

² Burleigh, 20th July 1848, 10 D. 1517.

³ Park, 10th July 1838, 16 Sh. 1363.

⁴ Walker, 17th Dec. 1853, 16 D. 226.

⁵ Malcom, 17th July 1846, 8 D. 1201; affirmed 26th March 1849, 6 Bell's App. 359; Cooke, 26th Nov. 1850, 13 D. 158.

⁶ Eleia, 15th Dec. 1665, M. 5987.

⁷ See *ante*, pp. 1090-91.

Inhibition will be extinguished by a discharge, which, when recorded for preservation in any competent register, will be marked by the Depute-Clerk Register on the margin of the record of the inhibition. It is competent, but not usual, to record discharges at full length in the Register of Inhibitions. Inhibition will also be recalled or restricted by the Court of Session on cause shown; or, in its own terms, it may be restricted to lands within a particular locality, or otherwise of limited extent or value.

DISCHARGE OF
INHIBITION.

I now proceed to consider the Adjudication for debt. This is the diligence by which a creditor attaches, and in some cases transfers to himself, the heritable property of his debtor. It may be either for payment, as when the debt is liquid and past due,—or in security only, if the debt is future or illiquid, and the debtor *vergens ad inopiam*. The adjudication arose out of, and has now superseded, the older diligence of apprising; of which, having formerly given some account in connexion with the judicial sale of bankrupts' lands, it is not necessary here to say more.¹

ADJUDICATION
FOR DEBT.

Adjudications for debt were introduced by the Act 1672, cap. 19. That Act, after reciting the abuses which had arisen from apprisings as then in use to be conducted, enacted that in future there should be no apprisings led by messengers; but that in place thereof the Lords of Session should adjudge to the creditor, in satisfaction of his debt, such a part of the debtor's lands and other rights which were in use to be appraised as should be worth the sum, principal and interest, then due, and a fifth part more in respect the creditor wanted the use of his money, and was 'necessitat to take land for the same;' besides the composition to the superior, and expenses of the infestment. This was the 'special adjudication,' being applicable to a special or particular portion of the debtor's lands; and when a special adjudication took effect the lands were declared to belong to the creditor, if not redeemed within five years after decree. But in case the debtor should not produce a progress of titles, and renounce the possession and ratify the decree,—then it was declared lawful to the creditor to adjudge all the debtor's lands, as he might have appraised the same, conform to the Act 1661, cap. 62. This was the 'general adjudication,' which was redeemable within ten years. It was formerly necessary in the summons to conclude primarily for the special adjudication, and for general adjudication subject to the contingencies set forth in the Act of 1672; but the special adjudication was almost unworkable. It hardly ever took effect; and practically the proceedings resulted in the general adjudication. On this account it was, by the Lands Transference Act of 1847,² made no longer necessary to conclude for the special adjudication. The conclusion of the sum-

¹ See *ante*, p. 768. The procedure in apprisings was regulated by the Acts of Alexander II. c. 24; 1469, c. 36; 1621, c. 6; 1661, c. 62.

² 10 & 11 Vict. c. 48, s. 18.

mons now, therefore, is directly for the general adjudication, without the alternative of the special.

The special adjudication was deduced for the principal sum and interest, and a fifth part more, not in name of penalty, but in respect of the want of the use of the money; and whether the voucher of debt stipulated for a penalty or not, in case of failure, the special adjudication could not be deduced for more than the principal sum, interest, and a fifth part more as above, with the composition and expenses. To conclude for penalty in addition would have annulled the special adjudication. On the other hand, the general adjudication has no conclusion applicable to the want of the use of the money; but, if penalty is stipulated in the document of debt, the adjudication is deduced for the penalty as well as for the principal, interest, composition, and expenses.¹ The general adjudication is deduced also for interest on the composition and expenses of infetment, because such interest was allowed in apprisings by the Acts of 1621 and 1661.² By resorting to the special adjudication, the creditor was prevented from using personal or other diligence against the debtor. The creditor had taken, or proposed to take, land for his money. But the creditor leading the general adjudication was under no such restriction. He had simply taken a general security for payment, and was in the position of a proper creditor still.

**SUMMONS OF
ADJUDICATION.**

When the process of adjudication is directed not against the debtor himself, but against his heir, or where the debtor is an heir unentered, the procedure is in exact accordance with that already explained as requisite in the corresponding case of adjudications in implement against the heirs of debtors, or against debtors who are heirs unentered.³

The adjudication formerly proceeded on a bill or petition to the Lords of Session, and Bill-Chamber fiat, which was obtained as matter of course. Now the bill is dispensed with by the Lands Transference Act of 1847, sect. 17; and the summons of adjudication passes the Signet without any special warrant. The form of the summons is regulated by the Court of Session Act,⁴ and relative Act of Sederunt.⁵ It concludes for general adjudication, and for warrant of infetment and letters of horning against superiors. After decree is obtained, the creditor's right must be published, either by recording an abbreviate in the Register of Abbreviates of Adjudications within sixty days after decree, or by the creditor obtaining himself infet or registered. The completion of a real right by infetment or registration is sufficient to constitute a preferable security for the debt, which security stands good in competition with personal rights granted by the debtor, such as dispositions or heritable bonds not completed in the same manner.⁶ The preference covers the principal sum and whole bygone interest. When it is desired that interest shall run on so much of the sum in the adjudication as con-

¹ See Act of Sederunt, 26th Feb. 1684.

⁴ 13 & 14 Vict. c. 36.

² 1621, c. 6; and 1661, c. 62.

⁵ Act of Sederunt, 31st Oct. 1850.

³ See *ante*, Br. III. Tit. iii. chap. 3.

⁶ Mitchell, 13th Feb. 1731, M. 10,296; 1661, c. 62.

sists of interest, that may be effected by a poiding of the ground, which ADJUDICATION. is a real diligence, and makes the claim to interest real.

But the security arising by adjudication may not be absolute. The Act of 1661, as to apprisings, declared that, when an apprising was Pari passu PREFERENCE. effectually led, all others led before it, or within year and day after it, should be entitled to *pari passu* preference with it; and this regulation has been extended to adjudications. An adjudication is effectually led in this last sense when exact diligence has been done towards obtaining infetment; that is, as to lands held of the Crown, when the draft of a charter and note have been lodged in the office of the Presenter of Signatures in terms of the Crown Charters Act of 1847;¹ and, as to lands held of a subject, when a charge of horning against superiors has been given. There must also be recorded in the Register of Abbreviates of Adjudications a copy of the note, and an abstract of the draft of the charter, and the charge of horning, in the two cases respectively. These steps are, by the Judicial Procedure Act of 1856,² declared to be the proper diligence for the purpose foresaid. The same Act, by sect. 5, makes provision for conjoining different creditors in one summons of adjudication, in order to lessen expense to all parties, and to facilitate the *pari passu* preference of creditors in similar circumstances. When the steps above pointed out are taken, the adjudication in the case of personal debts is as effectual in a competition with other adjudications as if the adjudger had been actually infet. But, of course, when the adjudication is led on a *debitum fundi*, or real debt, there is no *pari passu* preference as in ordinary cases. The adjudication in such last case draws back to the date of the real right; and the adjudger is entitled to the same preference as if the adjudication had been then led.

Even after an adjudication has been completed and made effectual in the manner above pointed out, it is still only a redeemable right; but there are two ways in which the right of the adjudger can be made absolute and irredeemable.

1. The right of redemption competent to the debtor, we have seen, LEGAL TERM OF REVERSION. subsists for five years after the date of the decree in the case of a special adjudication, and for ten years after that date in the case of a general adjudication. These terms are called 'the legal,' that is, the legal term during which the debtor has power to redeem. At the expiry of the term applicable to the case, the creditor is entitled to bring an action against the debtor in the Court of Session, setting forth the subsistence of the debt, and that it has been neither paid by the debtor, nor satisfied by the creditor's possession of the lands; that the legal has expired, and that ever since the expiry thereof the lands have become irredeemable, and that therefore the same should be declared the property of the creditor heritably and irredeemably. Decree *in foro* being obtained, the right of the creditor becomes one of absolute property.³ The effect of a decree in absence does not seem to be perfectly settled.

¹ 10 & 11 Vict. c. 51. ² 19 & 20 Vict. c. 91, s. 6. ³ Campbell, 7th March 1794, M. 321.

2. The other mode by which the right becomes irredeemable is—(*first*) the completion of a real right, in feudal subjects, by charter and sasine, or decree of adjudication duly recorded; in burgage subjects, by expeding instrument of resignation and sasine, or recording the decree in the Register of Sasines; and (*secondly*) possessing the lands in virtue of such titles for forty years after the date when the legal expired.¹ The principle is that, by such title and possession, the right of redemption is cut off by the negative prescription. But, if possession does not ensue, the title by charter and sasine, or its equivalent, will not be enough.²

Adjudications for payment proceed upon liquid debts due by bond, bill, or other complete voucher. The subject-matter which can be adjudged consists of heritable property of all kinds,—liferents; reversions; tacks where judicial assignees are not excluded; heirship moveables; heritable offices; personal rights to lands; personal bonds secluding executors; rights of patronage; stock of a chartered company, where the diligence of arrestment is declared to be excluded; faculties competent to a debtor,—for example, his right to reduce a deathbed deed; and the like.

Material errors in the proceedings will be fatal to a decree of adjudication. Where the date of a bill founded on was stated to be '9th' in place of '19th,' the decree (which was in absence) was reduced.³ And, in completing a real right in virtue of a decree of adjudication, regard must be had to the state of the titles in the person of the party adjudged from. Thus, where the debtor had right to certain burgage subjects in virtue of a disposition with procuratory of resignation unfeudalized, the adjudging creditor obtained infeftment, *more burgi*, in virtue of his decree; that is, he proceeded as if his author had been infeft. The subjects had previously been disposed by the debtor to a third party, whose heir obtained infeftment in virtue of the procuratory in favour of the debtor and writs of transmission. The latter title was preferred, to the exclusion of the adjudger, whose infeftment was inept, as proceeding on a warrant deduced against one who was not infeft.⁴ An adjudger for debt is not bound to produce his debtor's title to the superior when claiming an entry.⁵

ADJUDICATION IN SECURITY.

The only other form of adjudication for debt is the adjudication in security. Although the term of payment of a debt is not come, or though the debt be illiquid, or only contingent, yet if the debtor be *vergens ad inopiam*,—or if the creditor be in danger of losing his debt, by other creditors adjudging year and day before him,—the Court of Session, *ex nobili officio*, will allow the creditor in such cases to lead an adjudication in security of his debt. But this process is founded solely in equity, and subsists merely as a security. It has no legal term, and may be redeemed at any time; and it can never carry the property to

¹ Ormiston, 7th Feb. 1809, F. C.

² Anderson, 3d March 1758, M. 10,676; Home, 29th Jan. 1740, Elchies, *voce* Adjudication, No. 23.

³ Barclay, 25th February 1846, 8 D. 549.

⁴ Marshall, 1st March 1782, M. 6927.

⁵ Stair, iii. 2. 26; Erskine, ii. 12. 24.

the creditor. It is always a general adjudication ; the first alternative of the Act of 1672 being quite inapplicable to such a diligence.

When an adjudication for debt has to be conveyed, the deed of transfer should be a disposition and assignation, disposing the lands heritably but under reversion conform to law ; and this deed will contain the clauses usual in a conveyance of lands, and will be followed by sasine or registration, in like manner as if it contained an irredeemable right. The assignation to writs will specially embrace the decree of adjudication, with the grounds and warrants of it, and any writs that may have followed upon it. The deed ought also to assign the debt contained in the decree, and vouchers of it.

The right of the adjudging creditor will be extinguished by payment, in the same way as that of any ordinary heritable creditor ; in which case the redemption can be declared in an action of declarator of extinction, or an action of reduction ; or a formal renunciation can be granted, by which the creditor will discharge the debt and decree, and declare the lands redeemed and disburdened thereof. Such deed ought to be recorded in the Register of Sasines, and likewise marked on the margin of the Register of Abbreviates of Adjudications. If the creditor has been in possession, he should obtain at the same time a ratification and discharge of his intromissions, of which he will of course render an account.

The only other real diligence which I have to notice is the process of Poining the Ground, being a process competent only to a creditor holding a real right,—for example, the creditor under a bond and disposition in security, contract of ground-annual, or the like. It is not competent to proprietors or to heritable creditors in possession. The diligence proceeds on the document constituting the real right. We have usually, first, a summons, in which the title of the creditor is specified, and the lands are described. The defenders are the proprietor and his tenants ; and, if the proprietor be deceased, his apparent heir may be called as a defender, without being previously charged to enter,—the conclusions being directed against the moveables on the ground, not against him personally.

The process attaches all moveables found upon the ground, and belonging to the proprietor ; also the tenants' moveables on the ground, but these only to the extent of their rents past due and current at the time. The conclusion of the summons is, that letters should be directed to messengers-at-arms, charging them to poind the moveables in question, but the tenants' moveables only to the extent just specified. Letters of poinding may be obtained under the Signet, upon the decree ; but execution is competent upon the decree of a Sheriff, without either Signet letters or Sheriff's precept.¹

It is only by this diligence that real creditors can obtain a preference

¹ Kennedy, 17th Feb. 1852, 14 D. 513.

over their debtor's moveables on the ground.¹ Formerly, creditors could by this process obtain a preference over all the debtor's moveables on the ground, even after their debtor was bankrupt and sequestrated, if their summons of poinding the ground was raised and executed before completion of the trustee's title by confirmation.² But by the Bankrupt Act, sect. 118, and former Acts now repealed, the effect of poinding the ground after sequestration is limited (as has been already explained)³ to the interest of the current term, and one year's bygone interest, if so much is in arrear at the time.

¹ Hay, 22d March 1826, 2 Wil. & Sh. App. 71.

² Campbell's Trustees, 13th Jan. 1835, 13 Sh. 237.

³ See *ante*, p. 1075.

TITLE IX.

LEASES.

I HAVE now to call your attention to the subject of Leases, which is becoming daily more important as a subsidiary branch or department of land-rights.

A lease, in its nature, is a personal contract, by which, on the one hand, the proprietor for the time, or lessor, gives the use or occupation of a particular subject to another as tenant, during a specified period, for payment of a yearly rent or other consideration, and on such conditions as may be agreed on; on the other hand, the lessee or tenant becomes bound to pay the rent and fulfil the conditions stipulated.

So long as leases conferred merely personal rights, they gave an altogether precarious tenure; because, whenever a real right came to be acquired by a purchaser or creditor, the tenant was liable to be ejected; and our legislators very early saw the necessity and essential equity of giving security of possession to tenants. This was done by the Act 1449, cap. 18, intituled, 'The byer of landes suld keepe the 1449, c. 18. tackes set before the bying.' The Act is very short, and is in these terms:—'Item, it is ordained for the safetie and favour of the puir
' people that labouris the ground, that they and all utheris that hes
' taken, or sall take, landes in time to come fra Lordes, and hes termes
' and zeires thereof, that suppose the Lordes sell or annaly that land or
' landes, the takers sall remaine with their tackes, unto the ischew of
' their termes, quhais handes that ever thay landes cum to, for siklike
' maill as they tooke them for.' Leases were thus at a very early period raised to the position of real rights, conferring a title of possession preferable to that of purchasers and creditors whose rights were subsequent in date to the time when actual possession under the lease had commenced. And, by the 'Registration of Leases (Scotland) Act, 1857,'¹ leases for a period of not less than thirty-one years, and possessing certain other specified requisites, can be registered in the register of sasines appropriate to the lands therein contained, on principles and with effects very similar to those arising in connexion with permanent land-

REGISTRATION
OF LEASES ACT.

¹ 20 & 21 Vict. c. 26.

rights. Leases falling under the Act of 1857 are in fact placed, as nearly as the case admits, on the same footing with such land-rights.

I will, by-and-bye, notice the particulars required in order to confer on leases the benefit of both or either of these Acts. In the meantime, I proceed to examine the various deeds or contracts of lease most frequently met with in practice, taking first the ordinary agricultural lease.

**AGRICULTURAL
LEASE.**

In early times, leases were unilateral deeds,—simple grants by the landlord to the lessee; and, whilst in that form, they sometimes contained a precept, and were followed by instrument of sasine in favour of the tenants. Now, the regular lease is almost always bilateral; though a unilateral document, if containing all the essential requisites of a lease, will be sustained.¹

DESTINATION.

The landlord's part comes first, commencing with the inductive clause, which may be the payment of a grassum, and obligation to pay yearly rent, but now is most usually simply the obligation for the yearly rent. We have next the destination to the lessee, pointing out the line of succession in case of his death, and generally excluding the right of assigning or subsetting. The clause usually employed runs thus:—'To A. and his heirs, excluding heirs-portioners, and likewise excluding all assignees, legal or voluntary, and all sub-tenants.' In agricultural leases of ordinary duration (the case we are now considering) there is a *delectus personæ* as regards the tenant. To get a suitable tenant who will live in good neighbourhood and work his farm well is next in importance to getting a good rent. Apparently, leases were at first so personal, that they came to an end by the tenant's death. But for a very long time they have been descendible to his heirs; and the heirs of line are here meant, not heirs of conquest; as leases do not require sasine or its equivalent for their completion, and conquest, as regards succession, is confined to subjects capable of infeftment. The exclusion of heirs-portioners is of obvious importance: two or more female tenants, especially if married, would be unsuitable.

**DELECTUS
PERSONÆ.**

**ASSIGNEES AND
SUB-TENANTS.**

As regards voluntary assignees and sub-tenants, express exclusion is not required for the landlord's protection, in leases of ordinary endurance. The implied *delectus personæ* is enough for that effect in such cases.² But judicial assignees, by adjudication or sequestration (which last is just adjudication of the most comprehensive character), are not excluded without the express clause.³ If, however, there is no express destination, as in Macalister's case to be immediately cited, the right to assign and subset is implied in leases of extraordinary endurance,—for example, thirty-eight years.⁴ And in such leases sub-tenants will not be excluded by the exclusion of assignees: there must be an express clause applicable to sub-tenants also.⁵ But even if the lease of a farm be for thirty-

¹ Burnet, 27th Nov. 1835, 14 Sh. 74.

² Alison, 22d Jan. 1788, M. 15,290;
Earl of Casillis, 5th Dec. 1806, M. App.
Tack, No. 14.

³ Cunningham, 21st November 1770, M.
10,410.

⁴ Simson, 22d May 1794, M. 15,294.

⁵ Trotter, 22d Nov. 1770, M. 15,282.

eight years, a special destination to particular heirs is not capable of being altered or defeated by the institute, as it might be if it occurred in an ordinary conveyance of land.¹ The rights under leases are governed by the law of contract.

Even, however, when assignees and sub-tenants are expressly excluded, the tenant's creditors can possess through the tenant, although he may be bankrupt,² or by putting in a manager to carry on the farm. Such arrangements, however, are in general prejudicial to the farm; as it must always be the interest of creditors to extract the utmost from a bankrupt's estate, and, even when they are carefully superintended, it is not to be expected that they will do justice to the farm. It is therefore usual to provide, in agricultural leases, not only that the tenant shall not be entitled to conduct the farm by a manager, but that, in case of his bankruptcy, it shall be in the option of the landlord to terminate the lease. The irritancy in case of bankruptcy was found effectual;³ but you will observe I propose only an optional, not an absolute irritancy. It should be left to the landlord to decide at the time what course he will take. And, where the lease prohibited possession for behoof of creditors, directly or indirectly, in case of the tenant's bankruptcy, the clause was construed as intended solely for the landlord's behoof; and a manager, who was appointed with the landlord's consent, was found not entitled afterwards to withdraw from the management.⁴ Sometimes assignees are excluded unless approved by the landlord; but such qualification is not required in order to give the landlord the option of accepting an assignee, if he thinks proper; and, on the other hand, if he declines to accept the assignee offered, he is not bound to state reasons for so doing.⁵ The operation of the clause, with and without express reference to the landlord's consent, is thus practically the same.

The absolute exclusion of assignees, however, is sometimes qualified so as to enable the tenant to leave the lease on his death to any one of his sons, or, in case of his leaving a family in minority, to his wife; or otherwise, to prevent the lease falling (in the landlord's option) to the tenant's eldest son, as heir-at-law, which may be an unsuitable family arrangement. The relative provision in the lease on this point is introduced after the exclusion of assignees, and is in these or similar words,—‘except that the tenant shall be entitled, by any testamentary deed to take effect after his death, to assign the lease hereby granted to any one of his sons’ (or as the case may be), ‘passing over the eldest son or heir-at-law for the time.’

After the destination, we have the description of the lands let, which should name the lands, and the parish and county in which they lie. This

ASSIGNEES AND
SUB-TENANTS.

DESCRIPTION
OF LANDS.

¹ Macalister, 22d February 1859, 21 D. 560.

² *Monro*, 11th Dec. 1811, F. C.

³ *Forbes*, 2d June 1812, F. C.

⁴ *Kinloch*, 7th June 1836, 14 Sh. 905.

⁵ *Muir*, 20th Jan. 1820, F. C. See also *Duke of Portland*, 9th November 1865, 4 Macph. 10.

is usually sufficient, as identification is the main object of the description. But if the lands are held by a tenant at the time, exactly as they are to be possessed by the new lessee, it will in general be advisable to describe them also 'as possessed by C. D., the present tenant thereof.' I strongly recommend that the quantity be not specified, unless the rent is to be at the rate of so much per acre; and even in that case it is well to get the measurement ascertained and mutually agreed on before the lease is engrossed for signature, and then to state the slump rent.

**RESERVATION
OF MINERALS.**

It is usual, after the description of the lands, to insert a variety of reservations in favour of the landlord; some of which, however, arise by law, without an express clause in the lease. We have, first, a reservation of mines and minerals, with power to work them on payment of surface damages. The mines and minerals unquestionably remain with the landlord, and do not fall under an ordinary agricultural lease of the lands; and it has been decided that he has power to work them without express clause of reservation in the lease.¹ But Lord Chancellor Eldon has spoken of the law as different in England on that point; and the power to work should not be omitted.

TREES.

We have likewise the reservation of the plantations and trees on the farm, with power to the landlord to cut and remove the trees, and to plant others in their stead; also to resume a limited quantity of ground for planting,—he keeping up the plantation-fences, and making an allowance out of the total rent for the land resumed, to be fixed by arbiters.

Power is also reserved to straighten marches and excamb ground with neighbouring proprietors or tenants; the landlord making allowance or receiving rent for the land given or received in such transactions.

GAME.

The game is also usually reserved, with power to the landlord to sport over the farm; though this reservation and power are not required in order to give the landlord what is expressed in them. The tenant, however, if not prohibited, can kill hares, these not being now game; and likewise, for the protection of his crops, he may kill rabbits, if not in a warren or enclosure.² If, therefore, the right of killing hares and rabbits is not to be allowed to the tenant, the lease must expressly say so.

**ENDURANCE
OF LEASE.**

The endurance of the lease is next specified, which is seldom less than nineteen, or more than twenty-one years, from the term of the tenant's entry. If any break is to be allowed, it will be expressed in this clause. In a special case, where the term of endurance was omitted in the lease, reference was allowed to the advertisement of the farm; and the term there stated was held to be that for which the

TERM OF ENTRY.

lands were let.³ The term of entry, which will be stated in this clause, varies according as the farm is wholly or chiefly pasture or arable, and according to the custom of the district. In pasture farms, Whitsunday is the usual term of entry, except as to such land as

¹ Smith, 21st June 1768, M. 15266.

³ Russell, 14th May 1835, 13 Sh.

² Moncrieff, 12th Feb. 1828, 6 Sh. 530. 752.

is arable, in regard to which entry is usually deferred till Martinmas following. In arable farms, again, Martinmas is the more usual term, except that in some districts entry to the houses, and lands in grass, is given at the Whitsunday preceding.

We next have the clause of warrandice. This, when absolute, as it usually is, implies that the landlord shall indemnify the tenant for his loss in case he is evicted from the possession of the lands let. The claim against the landlord, in such cases, extends to the full amount of the estimated damages or loss to arise during the term of the lease unexpired at the time of the eviction. Absolute warrandice is implied in a lease when no warrandice is expressed.¹ WARRANDICE.

We now come to the obligations of the tenant, the first of which is to pay the stipulated rent. The rent is usually payable half-yearly; the first payment commencing at a term previous to which the first year's crop may have been partly realized, and the second payment six months thereafter, by which time the whole crop ought to be realized. Thus, if the tenant enters at Martinmas 1858, his first crop will be that of the year 1859, and his first year's rent will be made payable one-half at Candlemas, or perhaps Whitsunday, 1860 (fifteen or eighteen months after the term of entry), the other half at the Lammas or Martinmas following. The future rents will go on regularly at intervals of six months during the currency of the lease, with this exception, that the rent of the last crop under the lease should be made payable before the crop is removed, otherwise the security of the crop may be lost to the landlord. The obligation for payment should stipulate for penalty in case of failure, and interest at five per cent. during non-payment. If the rent is payable in grain, or in kind, the rules for conversion into money should be specified.

Sometimes the tenant is taken bound to pay public and parish burdens. Without such obligation he is liable only to pay half of the schoolmaster's salary,² half of the poor's-money, and the whole statute-labour road-money. An obligation on the tenant to pay the whole public burdens imposed or to be imposed on the lands will not make him liable to pay the feu-duty to the superior, which is not a public burden.³ On the other hand, a landlord who bound himself to relieve the tenant of the whole public burdens affecting the lands was found liable to pay the road-money usually payable by the tenant.⁴ PUBLIC
BURDENS.

The landlord is bound at Common Law, and he usually expressly binds himself, to put the houses and fences in sufficient habitable and tenantable condition at the tenant's entry. It is very important that this general obligation should be made specific, by reference to a schedule of what is to be done; or that there should be a *maximum* sum named, to be laid out by the landlord, within a specified number of years from the REPAIRS.

¹ Middleton, 27th November 1828, 7 Sh. 76.

² 1696, c. 26.

³ York Buildings Co., 26th July 1737, M. 15,338.

⁴ Brown, 11th July 1839, 1 D. 1237.

commencement of the lease, in necessary repairs or otherwise; or that a party should be named, at whose sight the repairs, etc., are to be executed. If no definite arrangement on this point is made, there is risk of trouble and loss to both parties, and of ill-feeling arising between them. When the landlord's obligations in the above particulars are fulfilled, the tenant is bound by law, and is usually taken expressly bound, to maintain the houses and fences during the lease, and to leave them at the expiry in the like condition as he gets them, tear and wear always excepted. This obligation on the part of the tenant, however, will not extend to the repairing of damage caused by a hurricane or any extraordinary accident or occurrence.¹ In a case where the premises were destroyed by fire, and both parties wished them to be rebuilt, the Court held the cost of rebuilding to fall on the landlord.² But, where the landlord refused to rebuild after a fire, the House of Lords, reversing the judgment of the Court of Session, found that neither he nor the tenant was bound to rebuild.³ This decision was founded on the principle that *res perit domino*, and that, when lands and houses are the subject of a lease, the tenant is *dominus* to the extent of his interest under the lease, the landlord is *dominus quoad ultra*. In this case the Lord Chancellor said that difficulties, such as there occurred, should be obviated by express stipulation. It is usual for the landlord to insure the houses in his own name against fire; and leases usually provide in what proportions the parties are to pay the yearly premium and duty. In connexion with this obligation, there ought to be a provision for disposal of the money to be paid by the insurance company in case of a fire. It is usual to give the landlord a large discretion on this point, as he is the party chiefly interested. But the tenant can insure on his own account, and when he does so, and a fire occurs, he is not bound to communicate the sum received by him from the insurance company to the landlord, nor to lay out any part of it in rebuilding what has been destroyed by the fire.⁴ Apparently, in case of the destruction of the houses, the tenant will be entitled (if they are not rebuilt) to an abatement of rent, or, if the houses destroyed are essential to the proper occupation of the farm, to abandon his farm altogether.⁵

When a tenant erects buildings or fences on the farm during his lease, he is bound to leave them at the termination of the lease without compensation, unless specially stipulated for. But the general obligation on the tenant, to keep and leave the buildings on the farm in repair, does not extend to such as are erected by himself without compensation.⁶ But it is usual, when the tenant is to erect buildings or fences at his own expense, to stipulate that he shall be paid for them at the expiry of the

¹ Clerk, 10th July 1741, M. 10,128; Stirling, 26th Feb. 1857, 19 D. 568.

² Swinton, 16th Jan. 1810, F. C.

³ Bayne, 30th May 1811, F. C.; reversed 22d March, 12th May, and 3d July 1815, 3 Dow's App. 233.

⁴ M'Intosh, 21st January 1831, 9 Sh. 310.

⁵ Bell on Leases, i. 240. See also M'Intosh's case.

⁶ Thomson, 8th February 1822, 1 Sh. 307.

lease, according to a valuation to be then made; in which case he will be taken bound to keep and leave them in good order; and the obligation in his favour is held to be a proper condition or part of the lease, and therefore effectual and binding on singular successors of the landlord in the farm.

The tenant is further bound by law, and is usually taken expressly bound, to enter into possession, and to stock and labour the farm; and, if he fails to stock it properly, the Sheriff will, on application, order him to provide stocking. It is also usual to bind the tenant to reside on the farm.

We next have the obligation as to cropping and manuring the farm, CROPPING. the object of which is to prevent the lands from being impoverished and run out or mismanaged. With this obligation there is in general connected a stipulation that, without prejudice to the landlord's right to enforce specific implement of the obligations of the lease, which he is always entitled to do, the tenant shall pay a certain amount of additional rent for every acre of land which shall in any year be miscropped; and if this stipulation is made pactional, and not penal, the Court will enforce it literally, unless it be extravagant.¹ If it be in the shape of a penalty, it will authorize a claim only to the extent of the actual loss by the miscropping, the amount of which will be a question for a jury.² The tenant, however, is not entitled to miscrop upon payment of the penalty, or even of the stipulated additional rent. He is bound by the obligations of the lease; and though I have recommended an express provision that the landlord is not bound to be satisfied with the penalty or additional rent, there is no doubt of his legal right to require the fulfilment of the lease without such express clause.

The tenant is likewise bound by law, and is usually taken expressly bound, to consume on the farm the whole straw and fodder produced on it, except that of the last or waygoing crop.³

We have then the tenant's obligation to remove at the expiry of the lease. This, as usually expressed, binds the tenant to remove without OBLIGATION TO REMOVE. warning; but it is fully settled that warning is necessary notwithstanding. WARNING NECESSARY. The warning has to be given forty days before the term of removal named in the lease, whatever that may be; and, if the lease names different terms of removal from lands and houses, or other subjects contained in the lease,—that is, if there be two or more terms of partial removal,—the warning must be given forty days before such of these terms as is first in date. If the lease contains consent to registration for execution, a charge to remove may be given upon the decree of registration. If there are only missives, or a lease without consent to execution, there must be a summons of removing, which, like the charge on the decree of registration, has to be executed forty days before the term of total removal, or first term of partial removal when there are two or more such terms; and the summons has likewise to be called in Court before

¹ Lawson, 16th May 1832, 10 Sh. 531.

² M'Kenzie, 18th June 1811, F. C.

³ Pringle, 30th June 1796, M. 6575.

the commencement of the forty days. The term being come, and decree obtained on the summons, the removing will be carried into effect by a Sheriff's precept on forty-eight hours' warning; or, if there has been a charge on the decree, the Sheriff will eject the tenant on six days' notice.¹ A letter, containing an obligation to remove, granted shortly before the time when legal warning is to be given, and expressly dispensing with formal warning, is equivalent to a decree of removal in terms of the lease; and, if the lease is stamped, the letter is regarded as part of the contract, and held therefore not to require any further stamp.² If there is no timeous warning, or its equivalent, the subjects are held to be tacitly re-let for another year; and it is not uncommon to stipulate that, in case of the subjects being possessed by tacit relocation or otherwise, without a new and formal written bargain, the tenant shall pay extra rent; and if this is made pactional and not penal, and the amount of extra rent be not exorbitant, the stipulation will be enforced as part of the bargain between the parties.³ The landlord who grants a lease can raise a removing in virtue of the title on which he granted the lease, whether such title be feudalized or not, or even though he was possessing on apparency only. The heir of the last proprietor is entitled to raise a removing before completing titles to the lands; but he must have a real right before the action is called in Court. All other parties, in order to be entitled to raise a removing, must have a real right in the lands.

BUILDING LEASE.

I next advert to the lease of a small portion of ground for building purposes, which strongly resembles a feu-contract of ground for the like purposes. The main distinctions between this and the agricultural lease are, that the building lease is usually of long endurance,—99 years, or even 999 years, not being a very uncommon term. It is therefore assignable without special destination to assignees; and the ground may be sublet likewise without special power.

As the yearly rent in such cases is above the agricultural value, it is generally stipulated that a house, of value sufficient to secure the rent, shall be erected by the tenant on the lands within a limited time, and thereafter maintained during the currency of the lease; and there may be, as in feu-contracts, conditions against building any more than one house, and on various other points, for the preservation of amenity. But there is this great distinction between the two cases as regards the necessity for restraining clauses, that whereas the vassal under a feu-contract is absolute proprietor, and so can do all the acts lawful to a proprietor unless validly restrained, the tenant under a lease is not proprietor. The landlord remains proprietor, and as a general rule the tenant can do nothing which he is not expressly authorized to do. At all events,

¹ The Act 16 & 17 Vict. c. 80, ss. 30, 31, has in certain cases simplified the process of removing, by providing that a probative lease, or letter of removal, shall have the same effect as a decree of removing.

² Bain, 14th July 1852, 14 D. 1007.

³ McIntosh, 1st Feb. 1798, M. App. Tack, No. 5.

he can do nothing inconsistent with the general objects for which the lease is granted to him. There is not, therefore, the same essential occasion for stringent clauses of irritancy, on the points now under consideration, in the case of the lease, as in that of the feu-contract.

I next notice the mineral lease. This important instrument has of late years come into extensive use. It is classed among leases, and is, in form, strictly a lease. But, in the leases we have been considering, the use only of the land—*salva substantia*—forms the subject granted by the landlord. In this case, what is granted is the privilege of removing and consuming certain substances under the surface of the ground, and of using and displacing so much of the surface as may be required in winning, manufacturing, storing, and removing these substances, or their produce when manufactured. MINERAL
LEASE.

I will notice only the leading distinctions between this and the agricultural lease. The mineral lease is often granted to a trading company; and assignees and sub-tenants are in general not absolutely excluded.¹ It is common to stipulate, however, that notwithstanding assignation or sub-lease the original tenants shall remain bound for the rent and other prestations incumbent on the tenants.

There is always an exception, from leases of underground minerals, of those which lie under public roads, and houses, and buildings standing on the ground, and for such a space along or around the same as may be thought necessary for their stability and security.

The term of endurance varies much more than in the case of agricultural leases. It is seldom less than nineteen and is often thirty-one years, or even longer, if heavy outlay is expected at the commencement. But the mineral lease, being of a subject which may be untried, or the extent or quality of which is not fully known, is a speculation on the tenant's part. Provision is therefore necessary for enabling the tenant to be quit of the obligations in case the trials shall fail, or the field prove not workable to profit; in other words, in case, after a fair and full endeavour on the tenant's part to turn the lease to good account, the speculation shall not succeed. With that view the lease generally allows breaks to the tenant at intervals of five years, upon previous written notice of six or twelve months, and without any cause assigned. ENDURANCE.

The lease then gives the tenant the necessary powers to search for, win, work, store, and remove, or use and consume the minerals, and to make the necessary erections and works for that purpose, subject to various provisions for securing that the whole minerals shall be faithfully wrought out if possible, and to qualifications for protection against needless or accidental damages; the burden of all which damages, if any shall arise, is thrown on the tenant. These powers and provisions are often very minute and particular, especially when underground minerals are to be wrought in the vicinity of mansion-houses, farm-steadings, TENANTS'
POWERS.

¹ See Duke of Portland, 9th Nov. 1865, 4 Macph. 10.

plantations, canals, railways, or public roads; and it is impossible here to give more than the above very general view of them;—moreover, they are in no two cases alike. It is very usual, however, to provide specially against the communication of pits or mines to neighbouring proprietors or tenants.

WARRANTICE.

We have then the clause of absolute warrantice, which it is usual to qualify to this effect, that the existence or quality of the minerals in the lands, or the success of the trials, is not guaranteed, but merely that, if the minerals are there, they are let in terms of the lease.

RENT OR LORDSHIP.

We have then the tenant's obligations, the first of which, relating to the yearly return to be made to the landlord, is of a peculiar nature.

The subjects let may be worked more or less largely; and the landlord should be paid accordingly. But at the same time provision should be made for securing that the subjects shall really be worked, and not allowed to lie in the ground. For accomplishing these objects, the tenant is taken bound to pay a fixed rent of specified amount, or, in the landlord's option (to be annually declared), a lordship or royalty of a certain proportion of the gross or net produce, or of so much per ton of minerals raised and sold. The obligation for the fixed rent is intended to prevent the tenants from neglecting or ceasing to work; and the obligation for the royalty is intended to secure to the landlord his fair share of the results of their working. But, as the tenants of new fields require a year or more before they can raise any minerals, they are generally not bound to pay more than the royalty during the time required for preliminary operations.

But it is usual also expressly to bind the tenant, in the case of an untried field, to take within a limited period all such measures as shall be necessary, in the opinion of some skilled person named or to be named by the parties or by the Sheriff of the county, for fairly and fully proving the field, and ascertaining whether or not there are minerals in it workable to profit; and, if breaks are allowed, it is usual to declare that no break shall be available without the report of such skilled person that all proper measures for the above purpose have been taken.

TENANTS' BOOKS.

For ascertaining the amount of the royalties, the tenants are bound to keep regular books, showing various particulars in full detail. Amongst these, the most essential probably is the statement of the daily output of each kind of mineral. Having ascertained the daily output, the landlord has the materials for a charge against the tenants, as it is necessary then to show the disposal; but various checks and securities as to this are often provided for. The books should be made patent to the landlord; periodical states should be sent to him; and accounts, made up from the books or states, should be declared sufficient to constitute and ascertain the amount of the royalties at any time due under the lease.

The tenant likewise binds himself to pay rent for land occupied or damaged by his operations during the lease; to restore and re-soil ground

made use of, as soon as it ceases to be required for his works ; to enclose ground whilst in use, and roads thereon ; to enclose pits when not in use, and, if required, to fill them up.

With regard to the workings, these are to be conducted in a regular and systematic manner, and so as to extract all the minerals capable of being wrought out and removed consistently with security above as well as below ground, and with good management. The tenant is usually prohibited from working quite up to the march of his field, lest he should encroach on a neighbouring field, and is subjected to a heavy lordship (not a penalty) in case he contravenes this provision ; and the landlord reserves right to enter the workings at all convenient times, to make or check surveys, plans, or reports.

On removal, the tenant is to leave the workings in good order, and readily accessible ; and, if required, he is to leave all erections and machinery on the premises to the landlord or incoming tenant at a valuation. The articles are usually to be valued as connected with a going work, if the work is likely to be carried on for a certain number of years specified. If the work is not to be carried on for the time specified, the principle of the valuation is to be that applicable to articles to be removed.

Such is a very general outline of the peculiar provisions of an ordinary lease of underground minerals.

The sub-lease, viewed as a deed, is substantially the same as the principal lease. It can competently be granted when there is in the lease express power to subset, or even express power to assign,—that being held as implying power to subset ;¹ and when the principal lease is of more than ordinary endurance. The power of subsetting, when granted without qualification, allows a sub-lease of the whole lands.² But the principal tenant remains liable to fulfil his obligations under the principal lease, just as if the sub-lease had not been granted. The sub-lease must be granted subject to all the conditions of the principal lease, a copy of which is usually delivered to the sub-tenant. The warrantice under the principal lease may be assigned to the sub-tenant, but is available to him even though not assigned.³ SUB-LEASE.

Before noticing the assignation of a lease, I may observe that, except in cases falling under the Leases Registration Act of 1857, when it is desired to take advantage of the powers conferred by that Act, the tenant's heir has full right to the lease, and can assign or otherwise dispose of an assignable lease, without service or any other written title.⁴ TENANT'S HEIR
NEEDS NO
SERVICE.

¹ Bankton, ii. 9. 1.

⁴ Boyd, 17th June 1761, M. 14,375 ;

² Crawford, 28th June 1758, M. 15,307.

Campbell, 16th February 1739, M.

³ Maxwell, 11th July 1827, F. C. and S. Sh. 935.

14,375.

He can also, without written title (except in the cases above referred to), reduce rights improperly granted by the tenant.¹ But as to leases under the Act of 1857, the heir, before availing himself of any of the powers conferred by that Act, must make up his title in one or other of the ways prescribed by the Act, and also record his title as thereby appointed.²

**ASSIGNATION
OF LEASE.**

The assignation of the lease is a very simple deed, whether granted under the Act of 1857, or independently thereof. When not under the Act, the tenant, for the considerations specified, assigns to the assignee the lease, with all its rights and privileges, from and after a certain term, subject to the burden of paying the future rents, and fulfilling the other stipulations, all which the assignee, by acceptance of the assignation, becomes bound to pay and fulfil, the cedent engaging to relieve him of bygone rents and other stipulations. When the lease assigned is of ordinary endurance, the warrandice is usually from fact and deed as regards the landlord's powers to grant the lease assigned, which powers the cedent does not warrant. But the cedent ought to warrant his own title, if he is not the original tenant, absolutely. Where the lease is of extraordinary endurance, and the tenant's right substantially that of a proprietor, I do not see why he should not grant absolute warrandice, including therein his landlord's powers, just as if he were conveying a permanent land right. But this is a point of some difficulty; and undoubtedly past practice, generally a good guide on such a matter, is against the absolute warrandice. The word 'dispone' is not necessary, and is not appropriate, in the conveyance of a lease.³

Under the Act of 1857, the form of the assignation is substantially as above, except as regards the warrandice, which is in the words of the corresponding clause in dispositions in the form given in schedule (A) of the Transference of Lands Act of 1847,—'And I grant warrandice;' and by the Leases Act, sect. 20, this clause has the same effect as the clause in the disposition, viz., absolute warrandice as regards the lands and titles, and warrandice from fact and deed as regards the rents.

**LIABILITIES OF
ASSIGNEE.**

Even when the lease contains power to assign, the assignee becomes liable to the landlord not only for the future, but likewise for the past due rents, if any are outstanding.⁴ The liability for these is held inseparable from the right to the lease. The cedent, however, is not liable (as in the case when a sub-lease is granted) for the future rents.⁵

**COMPLETION
OF ASSIGNEE'S
RIGHT.**

Under the Act of 1857, sect. 3, the right of the assignee is made complete by registration of the assignation in the register of sasines in which the lease has been recorded; the cedent's right being always recorded at the same time, if not previously. Where that Act does not

¹ Anonymous case, 26th June 1754, 5 Br. Sup. 814.

² Sects. 5, 7, 8, 9, Schedules (C), (E), (F).

³ Lord Moncreiff in Blair, 14th Nov 1849, 12 D. 114.

⁴ Ross, 5th Feb. 1786, M. 15,290.

⁵ Skene, 20th May 1825, 4 Sh. 25.

apply, then, if there is a sub-lease, the right of the assignee to the principal lease will be completed by intimation to the sub-tenant.¹ If there is no sub-lease, the assignee's right can be completed only by actual possession of the subjects.² This necessity of obtaining actual possession rendered leases (if not accompanied by sub-lease) of no avail as securities for debt, and still operates to the same effect, except when there is a sub-lease, and in cases to which the Act of 1857 applies. But, in the last-mentioned class of cases, the principle of registration has been made effectual not merely as to absolute assignations, but likewise as to assignations in security and redeemable.

Bonds and assignations in security can now be granted over leasehold property (if the lease is within the scope of the Act of 1857), and may be transferred to heirs or to voluntary and judicial assignees, including general disponees and trustees in sequestrations; and they may be discharged according to forms scheduled at the end of that Act, which are very similar, and, by relative enacting clauses, have effects very similar, to those of the corresponding deeds and instruments applicable to securities over permanent land-rights. But though assignations, or assignations in security, are available against the creditors of the cedent only when followed by actual possession, or, if under the Act, when registered, the assignee, by accepting an assignation which binds him to pay the future rents, and to which the landlord consents, incurs a liability to the landlord from which he cannot free himself without the landlord's consent.³ It must, therefore, be very often questionable whether a creditor should accept the assignation to a lease in the way of security, unless under the Act of 1857, which, by sect. 6, declares creditors not liable to the landlord until they enter into possession.

BOND AND
ASSIGNATION
IN SECURITY.

When a lease is to be given up before its natural expiry, the tenant grants a renunciation in favour of the landlord, discharging and renouncing the lease for the term still unexpired, the landlord freeing him of the corresponding rent and other burdens. The acceptance of such deed frees the tenant of his liability; and it is important to preserve evidence of such acceptance.

RENUNCIATION
OF LEASE.

I have still to observe that, in order to have the benefit of the Act of 1449, there are several essential requisites in connexion with leases.

ESSENTIALS OF
LEASE.

1. The lease, like every other right relating to land, must be in writing. A verbal lease will bind the parties when the agreement is limited to one year; but if it embraces a longer period it is not effectual even for a year, though the party challenging it should admit the verbal

WRITING.

¹ *Sime's Trustees*, 23d May 1806, M. App. Tack, No. 13.

affirmed 23d Sept. 1831, 5 Wil. & Sh. App. 476.

² *Brock*, 5th March 1830, 8 Sh. 647;

³ *Ramsay*, 20th Jan. 1842, 4 D. 405.

agreement for a longer term. It would make no difference in this respect that possession had followed upon the verbal lease. Either party might resile at the end of any year of possession.¹ Generally speaking, leases should not merely be in writing, but be probative. But, if possession has followed, an improbativ lease or missive, if proved or admitted to be the foundation of the possession, and if containing the elements of a proper lease, will constitute an effectual lease.² And even a verbal agreement may be made effectual for a term of years, if a grassum or price has been paid at the commencement.³ This is on the principle of *rei interventus*.

DEFINITE ISH.

2. A lease, in order to be effectual against singular successors under the Act of 1449, must have a definite ish or term of endurance specified in it. The Act is only applicable to tenants who have 'termes and zeires,' and 'unto the ischew of their termes.' The pure and simple question, whether a lease of very long endurance will be sustained against a singular successor, has never been properly tried; and one of our institutional writers⁴ expresses an opinion against the validity of leases for several thousand years. But the general opinion of lawyers now, I believe, is, that, if there be a definite ish, the requirements of the Statute on that point are complied with, however distant the term may be.

RENT.

3. There must be a rent or tack-duty. The Act says,—'the takers sall remaine with their tackes' 'for sicklike mail as they took them for.' The tack-duty may be in money or in grain, and it need not be equal to the value of the subjects; but it must not be illusory.⁵

POSSESSION.

Lastly. The lease must be followed by possession. Such possession is the appropriate legal mode of perfecting the real right of the lessee or tenant, just as sasine or registration is in the case of the singular successor in the lands; and, if the singular successor shall first complete his title, his right is preferable to that of the lessee, on the ordinary principles of law applicable to the completion of rights. Accordingly a lease second in date, but first completed by possession, would be preferable, as a title of possession, to a lease prior in date, but not completed by possession. The possession, however, must be under the lease, and, of course, posterior to the term of entry thereby fixed; and if the lessor, being an heir of entail, and entitled to grant leases for nineteen years and no longer, shall grant to the tenant under an existing lease a renewal for nineteen years, to commence after the expiry of such existing lease, and the lessor shall die before entry takes place under the new lease, the new lease is of no effect.⁶

The Act of 1449 has been found to extend to the leases of urban tenements;⁷ but it does not apply to leases of game.⁸ The right of

¹ Keith, 16th July 1636, M. 8400.

² Macpherson, 12th May 1815, F. C.

³ MacRorie, 18th Dec. 1810, F. C.

⁴ Bankton, ii. 9. 1.

⁵ *Ibid.*

⁶ Redhead, 27th Nov. 1792, Bell's 8vo

Cases, 202; reversed 5th Feb. 1794, 3 Paton's App. 309.

⁷ Macarthur, 6th July 1804, M. 15, 181.

⁸ Pollock, 5th June 1828, 6 Sh. 913.

See also Birkbeck, 22d Dec. 1865, 4 Macph. 272.

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killing game, viewed as a real right, is an incident of landed property. ESSENTIALS OF LEASE.
It may be enjoyed by the proprietor of lands over other lands as a servitude attached to such proprietor's own lands; but it never is permanently disjoined from the ownership of land as a separate tenement by infestment.¹

Under the Act of 1857 there are various requisites, all different from the above.

1. The lease must be probative (sect. 1).
2. It must be actually or practically for a period of not less than thirty-one years.
3. The registration must take place at or subsequent to the term of entry stipulated in the lease (sect. 2).
4. Except as to burgage subjects, leases executed after the passing of the Act (10th August 1857),—unless where executed in terms of an obligation to renew, contained in a lease of date prior to the Act,—must set forth the name of the lands of which the subjects let form a part.
5. Except as regards burgage lands, and mines or minerals, leases must specify the extent of the lands let; and such extent must not exceed fifty acres.

And, as regards both the Acts of 1449 and 1857, leases will not be effectual against singular successors, unless the proprietors, by or on behalf of whom they are granted, have real rights by infestment or registration.² Moreover, liferenters, though infest or registered, cannot grant leases to subsist beyond their lifetime; nor tutors beyond the endurance of their office, unless they have special powers to lease for longer terms; and leases granted on deathbed are reducible by the lessor's heir-at-law, if granted to his prejudice.³ But, as a general rule, a lease from a fee-simple proprietor will be binding on his heirs, whether it possesses the statutory requisites or not, and whether the granter had a real right or not.⁴

¹ Lord Corehouse in Pollock's case.

² Gordon, 29th Feb. 1780, M. 10,309.

³ Sample, 1st June 1813, F. C.

⁴ Crichton, 26th July 1631, M. 11,182

Carruthers, 23d Jan. 1717, M. 15,195.

INDEX.

	PAGE
<i>A ME</i> HOLDING. See <i>Holdings</i> .	
ABBREVIATE OF DECREE OF ADJUDICATION, .	664, 765
ABERDEEN ACT—	
Annuity to wife, ...	802
Provisions to younger children, ...	826, <i>et seq.</i> , 980
Provision by wife to husband, ...	847
Does not apply to new entails, unless expressly declared applicable, ...	980
<i>See Marriage Contract—Entail.</i>	
ACCEPTANCE OF BILL OF EXCHANGE, ...	445-449
Must be written on bill, ...	432
Effect of subscription of additional acceptor before and after issue, ...	440
<i>See Bills of Exchange.</i>	
ACCEPTANCE OF DEED—	
Grantee not bound till he accept of deed, ...	105, 106
Presumption that he is to have opportunity to consider, ...	106
Proof of acceptance if disputed, ...	<i>ib.</i>
ACCEPTANCE OF OFFER. See <i>Sale</i> .	
ACCEPTANCE OF OFFICE—	
By trustees and executors, ...	906
Is not to be presumed, ...	<i>ib.</i>
Legacy to non-accepting trustee, ...	916
Sole arbiter bound by acceptance to dispose of reference, ...	369
ACCEPTANCE OF RELINQUISHMENT OF SUPERIORITY, ...	735
ACCESSION, DEED OF, ...	749
Acceding creditors barred from taking separate measures, ...	750, 751
ACCESSORY RIGHTS. See <i>Charter</i> .	
ACCOMMODATION BILL, ...	453, 456
Liability of acceptor of, after bill prescribed, ...	485
<i>See Bills of Exchange.</i>	
ACCRETION—	
Validating superior's title to superiority, ...	689, 1051
Excluded by death of superior, ...	689
Infetment of assumed trustees will not validate charter granted by prior trustees not infet, ...	<i>ib.</i>
Of children's shares in a succession, ...	915

	PAGE
ACKNOWLEDGMENT OF SUBSCRIPTION, . . .	49, <i>et seq.</i>
Immediate subscription of witnesses necessary, . . .	49
<i>See Witnesses.</i>	
ACKNOWLEDGMENT, WRIT OF, ...	1087
ACT—	
ACT OF COURT.	<i>See Interlocutor.</i>
ACT OF GRACE—	
Dispositions <i>omnium bonorum</i> under application for, exempt	
from stamp-duty, ...	195
ACT OF HONOUR, ...	468
ACTS OF PARLIAMENT.	
<i>See Index of Statutes.</i>	
ACTS OF SEDERUNT.	
<i>See Index of Acts of Sederunt.</i>	
ACT OF WARDING, ...	493
ACT AND WARRANT—	
In favour of trustee in sequestration, ...	753
Effect of, as regards heritage, ...	<i>ib.</i>
Completion of trustee's title, ...	755
Effect of, as regards moveables, ...	294, 306
ADJUDICATION—	
As a burden on land, ...	664, 672
<i>See Litigiosity.</i>	
Plea of prescription founded on decree of adjudication, . . .	656
Right of redemption, ...	<i>ib.</i>
ADJUDICATION IN IMPLEMENT—	
Purpose of, ...	759
Summons of, against granter of obligation to convey land, . .	759
Decree equivalent to disposition, ...	760
Completion of adjudger's title, before Lands Transference Acts,	<i>ib.</i>
Changes introduced by these Acts, ...	761
Decree containing warrant to infest, ...	<i>ib.</i>
Changes introduced by Titles to Land Acts, ...	<i>ib.</i>
Decree may now be registered with warrant of registration, . .	<i>ib.</i>
Superior's rights not affected, ...	<i>ib.</i>
Where granter of obligation had only personal right, ...	<i>ib.</i>
Where granter of obligation dead, procedure against his heir	
unentered, ...	762
Procedure before Lands Transference Acts, ...	762, 763
Letters of general charge, ...	762
Action of constitution, ...	<i>ib.</i>
Letters of special charge,—of general special charge, ...	<i>ib.</i>
Action of adjudication in implement, ...	763
Procedure introduced by Lands Transference Acts, ...	<i>ib.</i>
Citation in action of constitution made equivalent to general	
charge, ...	<i>ib.</i>
Citation in action of adjudication made equivalent to special	
charge, or general special charge, ...	<i>ib.</i>
Procedure under Titles Acts, ...	<i>ib.</i>

ADJUDICATION IN IMPLEMENT—*continued.*

Actions of constitution and adjudication may be combined, .	763
Where heir renounces, decree <i>cognitionis causæ</i> , .	<i>ib.</i>
Followed by decree of adjudication <i>contra hæreditatem jacentem</i> , .	<i>ib.</i>
Citation and <i>induciæ</i> indispensable, .	764
<i>Annus deliberandi</i> ,—period now reduced to six months, .	<i>ib.</i>
Procedure against Crown, when granter of obligation has no heirs, .	<i>ib.</i>
Against heir unentered, on his own obligation, .	<i>ib.</i>
By next heir of entail, .	765
By creditor in bond and disposition in security granted by general disponer uninfest, .	764, 1070
Abbreviate of adjudication, .	765
Preferences depend on date of recording decree, .	<i>ib.</i>
Superior cannot prejudice prior adjudger, .	<i>ib.</i>
Preference of adjudger who first charged superior, .	<i>ib.</i>
Adjudger in implement ought to be able to instruct his pre- decessor's title, .	766

ADJUDICATION FOR DEBT—

Substituted for apprising, .	241, 537, 1095
Special adjudication redeemable within five years, .	1095
General adjudication within ten years, .	<i>ib.</i>
Summons of adjudication, .	1096
Abbreviate of decree recorded within sixty days, .	<i>ib.</i>
Completion of real right by creditor, .	<i>ib.</i>
<i>Pari passu</i> ranking of adjudgers for personal debts, .	1097
Adjudger's right redeemable, .	244, 1097
How made irredeemable, .	1097, 1098
What subjects can be adjudged, .	<i>ib.</i>
Errors in proceedings, .	<i>ib.</i>
Adjudger not bound to produce his debtor's title to superior, .	<i>ib.</i>
Conveyance of adjudication by disposition and assignation, .	1098
Terms held sufficient to convey, .	868, 869
Adjudication on bond carried by assignation of bond, .	1089
Adjudication in security, when competent, .	1098
Declaratory adjudication—	
By judicial factor, .	929
By beneficiary, .	932, 938, 1046
Adjudication of <i>spes successionis</i> incompetent, .	149
Under Bankrupt Act, adjudger selling not entitled to purchase, .	150
Adjudication of beneficiary's right under a trust, where competent, .	924
Of shareholder's interest in a company, .	407
Sequestration under Bankrupt Act of 1856 equivalent to decree of adjudication, .	752
Adjudication of entailed lands subject to qualification, .	956
Of heir's liferent right, .	<i>ib.</i>
Adjudication for debts contracted before recording entail, .	964
See <i>Entail</i> .	
Extinction of adjudication, .	1099
Abbreviate of adjudication, .	664

	PAGE
ADJUDICATION FOR DEBT—<i>continued.</i>	
Register of Abbreviates, ...	664
Applies to burgage as well as feudal subjects, ...	<i>ib.</i>
ADJUDICATION ON TRUST BOND, ...	1028
Gives feudal title to heir, ...	1029
ADJUDICATION, CHARTER OF—	
Operates confirmation of necessary writs, ...	688
Charter of adjudication in implement, ...	760
ADJUDICATION STAMP, ...	189
ADMINISTRATION—	
English letters of, admitted as probative in Scotland, ...	87
<i>See Confirmation of Executor.</i>	
ADMINISTRATION, RIGHT OF, ...	122
Excluded or renounced, ...	124
<i>See Marriage—Married Women.</i>	
ADOPTION—	
Of a deed, even when null and incapable of homologation, ...	180
Of an informal deed, by relative probative deeds, ...	80, 81
Effect of adoption, ...	182
Requisites in regard to adoption, ...	183
Adoption by a party after convalescence of investments made for him while under judicial curatory, ...	<i>ib.</i>
<i>See Homologation.</i>	
AD VALOREM STAMP-DUTIES.	
<i>See Stamp Duties.</i>	
ADVERTISEMENTS—	
Of sales under powers in bond and disposition in security, ...	677, 1073
AFFIDAVITS—	
Authentication of, by parties who cannot write, ...	43, 44
AFTER STAMPING—	
Of deeds with or without penalties, ...	196
Rules as to after-stamping, ...	<i>ib.</i>
Exceptions from general rules, ...	197
Effect of after-stamping, ...	198
AGE—	
Incapacity from imperfect age.	
<i>See Pupils—Minors.</i>	
Appointment of guardian to one in advanced age, and deaf and blind, ...	180
AGENT.	<i>See Law Agent.</i>
AGREEMENT—	
Verbal agreements validated by <i>rei interventus</i> , ...	186
Verbal agreement to sell lands, ...	647
After-stamping of agreements, ...	197
<i>See Contracts—Unlawful Contracts—Stamp Duties.</i>	
ALIENS—	
Incapable of acquiring heritage in Scotland, ...	134
Statutes relaxing exclusion of aliens, ...	<i>ib.</i>

INDEX.

1121

ALIENS—*continued.*

PAGE

Questions as to rights of aliens to terce and courtesy, . . . 135

Alien under allegiance to an enemy cannot, during war, sue for
debt without Queen's license, ... *ib.*

His right to debt only suspended, ... *ib.*

ALIENATION—

By debtors in defraud of creditors, ... 167

To conjunct or confident persons, or without onerous cause, . . . 168

ALIENATION, PROHIBITION AGAINST.

See *Entail.*

ALIMENT—

Of natural child is a debt not extinguished by discharge in
sequestration, ... 323

Power of wife to affect her aliment for necessities, ... 124

Not arrestable, ... 520

How far assignable, ... 314

· ALLENARLY—

Use of the word in destinations in marriage-contracts, etc.,
782, 786, 824, 838

Service under such destinations, ... 1019, 1020

ALLODIAL TENURE—

Sovereign's right held of no superior, ... 527

Allodial rights supplanted by feudal system, ... 531

Pass without service, ... 999

ALTERATIONS IN WRITS. See *Vitiations.*

ALTERNATIVE HOLDING. See *Holdings.*

ANNUAL RENT—

Symbols of infestment in, ... 611

ANNUITY—

To wife by marriage-contract, ... 801

Under Aberdeen Act, ... 802

Annuity belonging to wife before marriage, ... 846

Mode of securing annuities granted by trust-disposition, . . . 884

Discharge of annuities as burdens on land, ... 670

Under Ministers' Widows Fund Act not assignable, ... 314

Are future payments of life annuity arrestable in security? . . . 515

Arrestment attaches nothing if annuitant dies before end of
term, ... 520

Unless annuity affected by Apportionment Act, ... *ib.*

Annuities not falling under Apportionment Act cease at term
preceding death, ... 260

BOND OF, ... 259

When price paid, amount must be set forth, ... *ib.*

When annuity should be payable, ... *ib.*

Proportion due on annuitant dying between terms, ... *ib.*

Intimation of intended redemption when annuitant furth of Scot-
land, ... *ib.*

Formerly employed to secure lenders more than legal interest, . . . *ib.*

Where security given for annuity, liability of heirs, ... 260

	PAGE
ANNUITY—continued.	
When not for money paid and expressed, null by English Statute,	260
Stamp-duty on bond of annuity, ...	190
On assignation of bond where annuity irredeemable or redeemable, ...	1087
ANNUS DELIBERANDI—	
Period now reduced to six months, ...	764
ANTENUPTIAL CONTRACT OF MARRIAGE.	
<i>See Marriage Contract.</i>	
APPARENT HEIR—	
Possesses in virtue of ancestor's title, ...	656
In superiority, ...	731
Forfeiture or relinquishment of superiority by, ...	734
Representation and liability of, ...	ib.
Judicial sale by, ...	773
<i>See Heir Apparent.</i>	
APPOINTMENT—	
Power of, ...	837, 839
APPORTIONMENT ACT, ...	260, 520
APPRAISEMENTS—	
For legacy-duty, exempt from stamp-duty, ...	195
APPREHENSION—	
Of Debtor, ...	508
APPRENTICE—	
Bound to one master cannot engage with another, ...	345
May be required to teach younger apprentice, ...	346
But not to work on Sunday, ...	ib.
Nor to do work different from that specified in indenture, ...	ib.
Cannot substitute another in his place, ...	347
May be imprisoned on desertion, and refusal to return, ...	348
Not freed by entering army, or by entering navy unless bred to the sea, ...	ib.
<i>See Indenture—Master.</i>	
APPRISERS—	
Superiors ordained to receive, ...	536
Apprising superseded by adjudication, ...	537, 768
APPROBATE AND REPROBATE—	
Doctrine of, ...	870, 911, 912
ARBITRATION—	
Arbiter's interest in subject of submission, ...	352
If it emerge after execution of submission it disqualifies, ...	ib.
Advocate not disqualified by elevation to Bench, ...	ib.
Powers and duties of arbiters, ...	355
Arbiters ought formally to accept submission and name clerk, ...	ib.
To hold no private communications, ...	ib.
Cannot compel production of papers by third parties nor attendance of witnesses, ...	358

INDEX.

1123

PAGE

ARBITRATION—*continued.*

But Court will supply power on application, . . .	358
Have reasonable discretion to obtain advice and assistance, . . .	361
May stipulate for fees before accepting reference, . . .	<i>ib.</i>
But without stipulation even man of skill not entitled to fee, . . .	362
Sole arbiter bound by acceptance to dispose of case, . . .	369
Ancient method of enforcing this, ...	<i>ib.</i>
Practical difficulty now, ...	<i>ib.</i>
When unnecessary for parties to lodge claims, ...	355
Procedure as to ordering claims and answers, ...	<i>ib.</i>
If referee a man of skill, his duty may be to disallow proof, . . .	355, 358
But generally hearing parties and receiving all relevant evidence offered indispensable, ...	356
If one party heard, other must be, ...	<i>ib.</i>
When proof necessary it must be allowed, ...	357
Nature of, when reference to men of skill, ...	358
Parties liable for expense of advice and assistance, ...	361
Expenses may be awarded to either party, ...	<i>ib.</i>
Decree may include clerk's account, but not arbiter's fees, . . .	<i>ib.</i>
Arbiter stipulating for fees before entering on submission, . . .	<i>ib.</i>
Proceedings inept if both parties not duly represented at every stage, ...	362
<i>See Prorogation—Oversman.</i>	
Judicial proceedings and diligence incompetent, ...	368
Judicial challenge of arbiter's integrity, ...	<i>ib.</i>
Gross corruption, ...	<i>ib.</i>
Arbiter's notes, ...	369
Power to submit in trust-deed, ...	892

See Submission—Decree Arbitral.

ARRESTMENT—

By seller, of goods not delivered, ...	514
Except in this case, arrestee must be a third party, ...	518
Distinctions between pointing and arrestment, ...	514, 515
Arrestment in execution, ...	515
In security, ...	<i>ib.</i>
Debtor <i>vergens ad inopiam</i> , ...	<i>ib.</i>
Life annuity, ...	<i>ib.</i>
<i>Ad fundandam jurisdictionem</i> , ...	<i>ib.</i>
Effect of such arrestment as imposing <i>nexus</i> on property, . . .	516
Warrants of arrestment in execution, ...	<i>ib.</i>
Arrestment before giving charge to pay, ...	517
Warrants of arrestment in security, ...	<i>ib.</i>
Arrestment before execution of summons, ...	<i>ib.</i>
On dependence, ...	516, 517
Competent at any period of the litigation, ...	517
Warrant of arrestment to found jurisdiction, ...	518
This arrestment unnecessary in case of multiplepointing, . . .	<i>ib.</i>
Vitiations in arrestments, ...	<i>ib.</i>
Mode of executing arrestments, ...	408

	PAGE
ARRESTMENT—continued.	
What subjects arrestable, ...	519
Debts by partner to company arrestable by creditor of company, ...	<i>ib.</i>
Partner's interest in company arrestable in hands of company, ...	384
Of calls by creditor of company, ...	407
Of shareholder's interest in hands of company, ...	407, 408
Used along with adjudication, ...	407
Sums due by bond, etc., not followed by infetment, ...	519
Or followed by infetment not registered, ...	<i>ib.</i>
Sum in policy of assurance, ...	<i>ib.</i>
Would arrestment subsist after payment of another premium?	<i>ib.</i>
Of legacy, ...	921
Of beneficiary's right under a trust, ...	924
Subjects not arrestable, ...	519
Alimentary funds, ...	314, 520
Future debts, ...	520
Rents, interests, and annuities, ...	<i>ib.</i>
On term day, ...	<i>ib.</i>
Of sum in dispute, ...	521
Must be used in hands of proper party, ...	<i>ib.</i>
Of unpaid price in hands of purchaser, ...	<i>ib.</i>
In hands of factor for arrestee, etc., ...	<i>ib.</i>
Where debtor is deceased, ...	<i>ib.</i>
Where debtor has granted trust for creditors, ...	522
Possession by arrestee, ...	<i>ib.</i>
In hands of executors incompetent before confirmation, ...	<i>ib.</i>
See <i>Executor-Creditor</i> .	
In hands of quorum of trustees or executors, ...	523
Where debtor is minor, ...	<i>ib.</i>
Payment by arrestee in ignorance of arrestment sustained, ...	<i>ib.</i>
Foreign arrestee must be in knowledge of arrestments, ...	<i>ib.</i>
Intimation to foreign arrestee not necessary to validate arrestment, ...	<i>ib.</i>
Effect of arrestment by Crown, ...	<i>ib.</i>
By private parties, ...	524
How far does <i>nexus</i> subsist after death of arrestee?	<i>ib.</i>
Subsists after death of common debtor, ...	<i>ib.</i>
Preference according to date, ...	<i>ib.</i>
Preferable to prior assignation unintimated, ...	<i>ib.</i>
Heritable creditor preferred to arrester, ...	1075
Attaches rights of creditors under trust deed, ...	750
Sequestration equivalent to arrestment and furthcoming, ...	752
Of money in banks not registered, ...	299
Of ships, ...	519
Competent where debtor only part owner, ...	<i>ib.</i>
See <i>Ships</i> .	
Completion of diligence by multiplepointing or furthcoming, ...	524
Expenses, ...	525
Bankruptcy of debtor within sixty days of arrestment, ...	<i>ib.</i>
Withdrawal, loosing, recal of arrestment, ...	<i>ib.</i>

ARRESTMENT—*continued.*

Cautioner in loosing liable directly upon decree of furthcoming against him, ...	268
Prescription, ...	525
Delay in raising action of furthcoming, ...	<i>ib.</i>

ARTICLES OF ROUP—

Minutes as to price, etc., to be signed by exposor, ...	674
Minutes of roup to be signed by Judge, ...	<i>ib.</i>
Judge bound to allow full scope for competition, ...	675
Who may bid, ...	<i>ib.</i>
White-bonnet, ...	676
Sale under powers in bond and disposition in security, ...	675, 677
Consignation of price, ...	675
Forfeiture of purchase in case of failure to find security, ...	676
Penalty, ...	<i>ib.</i>
Error as to identity of subjects sold, ...	678

ASCENDANTS—

Intestate succession among, ...	860, <i>et seq.</i>
---------------------------------------	---------------------

ASSIGNATION—

OF PERSONAL OBLIGATIONS.

Clauses of forms in use till 1862, ...	280, 282
Object of intimation to debtor, ...	282, 283
Not necessary by English law, ...	283
What subjects may be assigned by short form of Act of 1862, ...	<i>ib.</i>
Objects and provisions of that Act, ...	<i>ib.</i>
Clauses of short forms, ...	284
Clause of registration still necessary in assignation of protest, ...	285
In what cases short forms applicable, ...	<i>ib.</i>
Narrative clause, ...	285
Requisites of clause of assignation, ...	286, 287
Assignation of bond secluding executors, ...	287
Transfer of railway mortgages by endorsement, ...	<i>ib.</i>
Rights of assignee, ...	288, 289
<i>Assignatus utitur jure auctoris</i> , ...	166
Implied warrandice in assignation of debt, ...	204

See *Warrandice*.

Effect of absolute warrandice, ...	289
--	-----

Creditor on payment not bound to grant assignation instead of discharge, if to his prejudice, ...	289, 290
---	----------

See *Intimation—Lease—Assurance—Bank Stock—Legacies*—*Patents—Copyright.*

What subjects cannot be assigned, ...	313
<i>Pacta illicita</i> , ...	<i>ib.</i>
Personal bond excluding assignees, ...	<i>ib.</i>
Shares in private company, ...	314
Alimentary rights, ...	<i>ib.</i>
Annuities, ...	<i>ib.</i>
Offices of trust, ...	<i>ib.</i>
Leases, ...	<i>ib.</i>

	PAGE
ASSIGNATION—continued.	
Emoluments of an office, ...	142, 143
Assignations in security of choses in action, ...	315
Assignation of rents, how affected by adjudication of lands, ...	<i>ib.</i>
In competition with purchaser or heritable creditor infeft, ...	<i>ib.</i>
Liferent right to lands or lease not within Act of 1862, ...	316
Ministers' stipends assignable in security, ...	317
Clauses of assignation in security, ...	<i>ib.</i>
Assignation of personal right under Titles to Land Acts, ...	742
<i>See Disposition and Assignment.</i>	
Assignation of bill of exchange, ...	452
When made use of, ...	454
Ought to be intimated, ...	<i>ib.</i>
Assignation of real burden, ...	1063
Of ground-annual, ...	1067
<i>See Heritable Securities, Transmission of.</i>	
Assignation of lease, ...	1112
Of obligation to convey lands completed by intimation, ...	716
Of <i>jus crediti</i> , ...	716, 717
Of legacy, ...	921
Must be intimated to trustees, ...	923
Special assignation supersedes necessity of confirmation, ...	870, 1049
Must be intimated after granter's death, ...	1049
ASSIGNATION TO RENTS—	
Clause in Transference of Lands Act, ...	594
Legal and conventional terms of payment, ...	<i>ib.</i>
Forehand rents, ...	594, 597
Pasture and arable farms, ...	595, 596
Intimation to tenants if disponent's right not made real, ...	597
Assignation unintimated not preferable to arrestment, ...	524
Clause in bond and disposition in security, ...	1069
ASSIGNATION TO WRITS—	
Clause in Transference of Lands Act, ...	593
Import of clause in feu-charter, ...	594
In disposition, ...	643
In bond and disposition in security, ...	1070
In disposition and assignation, ...	707, 708
In trust-disposition and settlement, ...	926
Does disposition of lands carry writs?	643, 926
Collateral rights ought to be specially conveyed, ...	643, 644
ASSIGNEES—	
Destination to, in feu-charter, ...	551
Assignees before infeftment, ...	551, 1058
Right of assignation now competent, ...	551
Assignee of purchaser, disposition to, ...	653
Destination to assignees in trust-disposition and settlement, ...	881
'Heirs and assignees whatsoever,'	996

ASSIGNEES—*continued*.

Assignee under English or Irish Commission of Bankruptcy has right to bankrupt's heritable and moveable estate in Scotland, ...	88
Assignee to a debt for smuggled goods, ...	145
Assignee to stock of company, where latent right, ...	167

ASSOCIATION, MEMORANDUM OF—

Its contents, ...	392, <i>et seq.</i>
Articles of Association, ...	393, <i>et seq.</i>
Stamp-duty, ...	394
Authentication, ...	92

ASSUMPTION OF TRUSTEES—

Power of, ...	885
---------------------	-----

ASSURANCE LIFE POLICY—

By proprietary company, ...	307
By mutual office, ...	308
Act of 1862 applies to all Scotch policies, ...	308, 309
Old and new forms of assignation, ...	<i>ib.</i>
New forms have no statutory effect as to English policies, ...	<i>ib.</i>
No right passed by mere delivery of policy, ...	308
Assignation necessary, and in Scotch policy must be intimated, ...	309
Arrestment during life of party, ...	519
Would arrestment subsist after payment of another premium?	<i>ib.</i>
Arrestment preferred to previous assignation to Englishman unintimated, ...	309
Procedure when offices refuse to acknowledge intimations, ...	<i>ib.</i>
Interest in life assured, ...	<i>ib.</i>
Assignation in security, ...	315, 1082
Stamp-duty, ...	315
Contents of policy do not fall within goods in communion, ...	798
Assurance on life of heir of entail, ...	955

ATTAINDER—

Incapacity arising from, ...	134
Forfeiture to Crown, ...	<i>ib.</i>
Attainted person not entitled to plead incapacity, ...	<i>ib.</i>

ATTESTATION—

Of witnesses, ...	47
-------------------------	----

See *Witnesses*.

ATTORNEY—

Duties of, in giving sasine, ...	609
--	-----

ATTORNEY, POWER OF—

Name imported from England, ...	418
By a company must, in England, have consent of all the partners, ...	386
Probably also in Scotland, ...	<i>ib.</i>

See *Factory*.

AUCTIONER IN REM SUAM—

Objection of, as against a tutor, not pleadable by third parties, ...	115
---	-----

	PAGE
AUGMENTATIONS OF STIPEND—	
Obligation of relief in feu-charter, ...	588
Obligation to be specially assigned in disposition, ...	594, 644
<i>See Warrandice.</i>	
AUTHENTICATION—	
Of Deeds, ...	28, <i>et seq.</i>
<i>See Deeds—Solemnities—Testing Clause.</i>	
Of writs of confirmation and resignation, ...	699
Of testamentary writings, ...	903, 904
Of extracts of registered deeds, ...	227
Of transfer of stock of incorporated railway and joint-stock companies, ...	92, 93
BACK-BOND—	
Security by absolute disposition and back-bond, ...	1079
Improbative back-bond of trust under 1696, cap. 25, ...	<i>ib.</i>
Security covers all sums due by the debtor to the creditor, ...	1080
Effect of registering back-bond for publication, ...	<i>ib.</i>
Creditor personally bound to superior,—risks affecting disponent, ...	<i>ib.</i>
BAILIE—	
Duties of, in giving sasine, ...	609
Bailies of royal burghs represent Sovereign, ...	736, 737
BAIRNS—	
Destination to 'bairns,' or to 'heirs and bairns,'	997
BANKRUPTCY—	
Effect of act and warrant of confirmation, ...	294, 307, 753
As to English or Irish estate, ...	88
English or Irish commission of bankruptcy, ...	87, 307
American commission of bankruptcy, ...	88
Discharge of bankrupt on composition, ...	323
Discharge without composition, ...	<i>ib.</i>
Judicial discharge not evacuated though composition not paid, ...	<i>ib.</i>
Creditors in second sequestration rank only for unpaid composition, ...	<i>ib.</i>
Creditors may make extrajudicial discharge conditional on payment of composition, ...	<i>ib.</i>
Cautioner not freed by creditor voting or drawing dividend, or assenting to discharge or composition, ...	338, 339
Discharge of principal under composition contract, ...	<i>ib.</i>
Ranking of creditors of company on estates of company and individual partners, ...	387
Cautioner ranked on proper debtor's estate, ...	388
Individual partners not ranked on company estate, ...	<i>ib.</i>
Provision as to part of bankrupt's salary payable to trustee, ...	143
Deeds by insolvent debtors in defraud of their creditors, ...	167, <i>et seq.</i>
Completion of debtor's title after bankruptcy, ...	172
Date of a deed in regard to latent preferences, ...	173
How far <i>jus mariti</i> will fall to trustee, ...	<i>ib.</i>
Preferences in sequestrations prohibited, ...	173, 174
Provisions of Act of 1856, ...	174

BANKRUPTCY—continued.

Bankrupt after discharge may become bound for the full amount
of his debt, ... 175

See *Fraud*.

Notour bankruptcy, ... 769

Operates revocation of *mortis causâ* deed, ... 900

Conveyances exempt from stamp-duty, ... 195

See *Sequestration*.

BANK STOCK—

Transference of, ... 309, 310

BANKING COMPANY—

If claiming to issue notes, liability unlimited, ... 398

How it may be effectually registered as limited, ... *ib.*

Effect of incorporation under Companies Act, ... 403

How it may sue, ... 405

BANK DRAFT—

Included amongst writings in *re mercatoriâ*, ... 90

Entry in bank pass-book not so, ... *ib.*

Stamp-duty applicable to, ... 194

Banker paying money on unstamped orders cannot recover from
debtor's cautioners, ... *ib.*

See *Draft on Banker*.

BANK NOTES—

Can they be poinded? 513

BANNS OF MARRIAGE—

Husband's curatorial power draws back to proclamation of banns, 123

BARONY—

Heritable jurisdictions attached to barony, ... 539

Conveyance of barony includes every component part, ... 552

Barony bounded by the sea, ... 566, 567

One sasine sufficient for whole barony, ... 616

Clause of dispensation, ... *ib.*

Entail of barony, ... 942

BASE HOLDING. See Holding de me.

BENEFICIUM INVENTARII, ... 1027

BEQUEST. See Legacy.**BILLS OF EXCHANGE AND PROMISSORY-NOTES—**

Definition of bill and promissory-note, ... 428

Of inland bill, ... 429

Form of bill, ... 430

Form of note, ... 431

Foreign bills drawn in sets, ... *ib.*

Bills and notes are privileged writings, being in *re mercatoriâ*, 90

Authentication of, ... 432

Must be in writing, ... *ib.*

Acceptance must be written on bill, ... *ib.*

Subscription by notaries, ... *ib.*

Summary diligence incompetent on bill subscribed by one notary, *ib.*

Witnesses must subscribe in case of notarial execution, ... 433

	PAGE
BILLS OF EXCHANGE AND PROMISSORY-NOTES—continued.	
Designation of witnesses, ...	433
Bill signed by initials, ...	<i>ib.</i>
By mark, ...	<i>ib.</i>
Subscription in pencil, ...	434
Blank acceptance,—skeleton bill, ...	<i>ib.</i>
Drawer's subscription, ...	435
Death of acceptor or drawer, ...	<i>ib.</i>
Bankruptcy of drawer, ...	<i>ib.</i>
Bill holograph of drawer, but not signed, ...	<i>ib.</i>
Bill signed by procuration, ...	436
By trustee or cautioner, ...	438
Subject-matter must be money, ...	<i>ib.</i>
Bill for price of contraband goods, ...	146
For gaming debt, ...	146, 147
There must be an order or promise to pay, ...	438
Order or promise must be absolute, ...	440
Address, ...	439
Subscription of additional acceptor, ...	440
Condition may be made apart from bill, ...	<i>ib.</i>
Extraneous matter, ...	441
Clause of interest, ...	<i>ib.</i>
Term of payment, ...	<i>ib.</i>
Payment by instalments, ...	<i>ib.</i>
Payee, ...	442
Bill payable to bearer, ...	<i>ib.</i>
Substitution of payees incompetent, ...	442, 487
Payee need not be the beneficiary, ...	442
The words 'or order' not necessary in Scotland, ...	<i>ib.</i>
Place of making bill, ...	443
Date, ...	<i>ib.</i>
Bill drawn on Sunday, ...	444
Acceptance on Sunday, ...	<i>ib.</i>
Place of payment, ...	<i>ib.</i>
'For value received,'	<i>ib.</i>
After-stamping, ...	197
ACCEPTANCE—	
Bill ought to be presented without delay, ...	445
In case of non-acceptance, immediate recourse on drawer, ...	<i>ib.</i>
Presentment of promissory-note for payment, ...	446
Distinction between bill and note as to negotiation, ...	<i>ib.</i>
Place of presentment, ...	447, 460
Effect of presentment, ...	447
Counter claims of drawee against drawer, ...	<i>ib.</i>
Payee preferred to posterior arrester, ...	<i>ib.</i>
Acceptance for honour <i>supra</i> protest, ...	<i>ib.</i>
Conditional or partial acceptance, ...	448
TRANSFERENCE OF BILLS OR NOTES—	
By delivery, ...	449

BILLS OF EXCHANGE AND PROMISSORY NOTES—*continued*.

PAGE

By indorsation, ...	449
Indorsees acquiring overdue bills liable to exceptions, ...	<i>ib.</i>
Indorsation by insolvent debtor, ...	170
Bill payable to a woman becomes property of her husband on marriage, ...	450
Summary diligence by husband, ...	<i>ib.</i>
Blank indorsation, ...	<i>ib.</i>
Risks in case of bill being lost or stolen, ...	<i>ib.</i>
Special indorsation, ...	<i>ib.</i>
Risk affecting special indorsation of bill previously indorsed blank, ...	451
Indorsation without recourse, ...	<i>ib.</i>
Restrictive indorsation, ...	<i>ib.</i>
Bill indorsed to 'A. B. only,'	452
Conditional indorsation, ...	<i>ib.</i>
Indorsation revocable before delivery of bill, ...	<i>ib.</i>
At what date does indorser's right begin?	<i>ib.</i>
Deletion of indorsation, ...	453
Acceptance of accommodation bill, ...	<i>ib.</i>
Divided indorsement, ...	<i>ib.</i>
Assignment ought to be used where bill protested, ...	452, 472
Or where a collateral obligation is to be transferred, ...	454
Diligence in name of holder available to cautioner, ...	<i>ib.</i>
Intimation of indorsation unnecessary, ...	<i>ib.</i>
Assignment ought to be intimated, ...	<i>ib.</i>
Bills drawn in sets, ...	<i>ib.</i>
Liabilities of parties to bill or note, ...	455
Of two or more drawers or acceptors, ...	455, 475
Of partners of unincorporated company, ...	455
Accommodation bill, ...	456
Distinctions between bond and bill debt, ...	457
Payment extinguishes bill, ...	<i>ib.</i>
Bill ought not to be paid till due, ...	<i>ib.</i>
Presumption that payment made by acceptor, ...	458
General receipt, ...	<i>ib.</i>
Party paying should obtain delivery of bill, ...	<i>ib.</i>
Presumptions as to payment, ...	<i>ib.</i>
Payment not by proper debtor, ...	<i>ib.</i>

NEGOTIATION—

Bills ought to be presented for payment though acceptance refused, ...	459
Days of grace, ...	<i>ib.</i>
Where last day of grace falls on a Sunday, ...	460
Place of presentment, ...	<i>ib.</i>
General and qualified acceptance, ...	<i>ib.</i>
What if place not specified, or acceptor not found, ...	461
Dishonour, ...	<i>ib.</i>
Protest, ...	462
Failure to negotiate liberates drawer and indorsers, ...	<i>ib.</i>

	PAGE
BILLS OF EXCHANGE AND PROMISSORY-NOTES—continued.	
Bankruptcy no excuse for failure to negotiate, . . .	462
Notice of dishonour, ...	<i>ib.</i>
Holder ought to give notice to all concerned, . . .	463
Acceptor not entitled to notice, ...	<i>ib.</i>
Exceptions from general rules, ...	<i>ib.</i>
Promissory-notes,—bills sent from abroad, . . .	<i>ib.</i>
Where drawer or indorsers are the proper debtors, . .	464
Right to notice may be waived, ...	<i>ib.</i>
Knowledge of dishonour, ...	<i>ib.</i>
Mode of giving notice, ...	465
NOTARIAL PROTEST, ...	<i>ib.</i>
Noting, ...	466
Instrument of protest, ...	<i>ib.</i>
In order to summary diligence, ...	467
Protest may be extended at any time within forty years, .	<i>ib.</i>
At whose instance may protest be made, ...	<i>ib.</i>
Who may act as notary, ...	<i>ib.</i>
Stamp, ...	468
Place need not be specified, ...	<i>ib.</i>
Specification of wrong place, ...	<i>ib.</i>
Act of honour, ...	<i>ib.</i>
Summary diligence,—at whose instance competent, . .	469
Application to Court by drawer or indorser producing receipt from protester, ...	<i>ib.</i>
Receipt to indorsee, ...	470
Promissory notes, ...	<i>ib.</i>
Registration of protest within six months, ...	<i>ib.</i>
Acts authorizing registration for diligence, ...	215, 216
Principal bill must be produced to registrar, ...	471
Registration not allowed after expiry of six months, . .	<i>ib.</i>
Decree of registration, warrant to charge, arrest, and poind, .	<i>ib.</i>
Protest in English form warrants summary diligence in Scotland, .	<i>ib.</i>
Summary diligence on foreign bill, ...	<i>ib.</i>
Receipt to indorsee after registration, ...	472
Party paying ought to obtain assignation of protest, . .	<i>ib.</i>
ERASURES OR ALTERATIONS IN BILLS OR NOTES, ...	<i>ib.</i>
May be made before issue, with consent of all concerned, .	<i>ib.</i>
But not after issue, even with consent, ...	473
Material parts of bill or note, ...	473, <i>et seq.</i>
The sum, ...	473
Rate of interest, ...	474
Term of payment, ...	<i>ib.</i>
Correction of blunder allowed, ...	<i>ib.</i>
Date of bill, ...	<i>ib.</i>
Names of parties and their position <i>inter se</i> , ...	475
Nature of consideration, ...	<i>ib.</i>
Place of payment, ...	476
Alterations after issue, ...	<i>ib.</i>

	PAGE
BILLS OF EXCHANGE AND PROMISSORY-NOTES— <i>continued.</i>	
Alterations before issue, ...	477
When is a bill or note 'issued?'	<i>ib.</i>
Proof that alteration made before issue lies on party claiming on bill, ...	<i>ib.</i>
PREScription, ...	<i>ib.</i>
Law of prescription depends on place where bill payable, ...	486
Sexennial prescription, ...	477
Commencement of six years, ...	478
Interruption by diligence or action, ...	<i>ib.</i>
Registration of protest only a step to diligence, ...	<i>ib.</i>
Diligence on Sheriff's precept effectual, ...	479
Diligence must be executed and action commenced, ...	<i>ib.</i>
Citation, though sufficient, will prescribe in seven years, ...	<i>ib.</i>
Informal execution, ...	<i>ib.</i>
Judicial demand by creditor is sufficient, ...	<i>ib.</i>
Interruption by producing bill and pleading compensation, ...	<i>ib.</i>
By petitioning for sequestration of party to bill, ...	480
Action commenced in England, ...	<i>ib.</i>
Where several obligants, action against one interrupts as to all, ...	<i>ib.</i>
Decree must be in favour of creditor, ...	<i>ib.</i>
Effect of prescription, ...	<i>ib.</i>
Decree in absence, ...	<i>ib.</i>
Adjudication on prescribed bill is inept, ...	481
Separate voucher, ...	<i>ib.</i>
Presumption of payment overcome only by writ or oath, ...	<i>ib.</i>
Debtor's writ, ...	482
Markings of interest, etc., ...	<i>ib.</i>
Acknowledgment within the six years of no avail to elide prescription, ...	<i>ib.</i>
Acknowledgment by one of several obligants will not affect the others, ...	<i>ib.</i>
Distinction between the bill and the debt, ...	<i>ib.</i>
Debtor's oath, ...	484
Must prove constitution of debt and resting-owing, ...	<i>ib.</i>
Bill may be referred to as adminicle of evidence, ...	<i>ib.</i>
If constitution admitted, debtor must prove payment, ...	<i>ib.</i>
Partner's oath, ...	<i>ib.</i>
Acceptor of accommodation bill, ...	485
Where debtor is dead, and his representatives ignorant as to debt, ...	<i>ib.</i>
Exception of minority pleadable by holder, ...	486
Plea not applicable if bill held by trustee for beneficiary in minority, ...	<i>ib.</i>
Payment by cautioner authorizes claim beyond the six years, ...	<i>ib.</i>
Prescription not interrupted by debtor's outlawry, ...	<i>ib.</i>
Bill for services, ...	<i>ib.</i>
Legacy may not be granted by bill, ...	<i>ib.</i>
Substitution of payee annuls bill, ...	487

	PAGE
BILLS OF EXCHANGE AND PROMISSORY-NOTES—<i>continued.</i>	
Is donation by acceptance competent?	487
Donation by indorsation, ...	<i>ib.</i>
Donation <i>mortis causâ</i> , ...	<i>ib.</i>
<i>Induciæ</i> of charge on bill or note, ...	504
Bills not arrestable, ...	519
Distinction between bills and notes, as to Act 1695, c. 5, ...	170
Act 1696, c. 25, does not extend to indorsation of bills, etc., . . .	229
Blanks in bills, ...	<i>ib.</i>
Drafts on bankers. See <i>Draft on Banker.</i>	
BILL OF LADING—	
Regulation as to after-stamping, ...	197
BILL OF SALE OF SHIP—	
Authentication of, in terms of Merchant Shipping Act, ...	92
See <i>Ships.</i>	
BLANK ACCEPTANCE—	
Skeleton bill, ...	434
BLANKS IN WRITS—	
Effect of, ...	226, <i>et seq.</i>
Writs blank in grantee's name null under 1696, c. 25, ...	226
Nullity strikes only at writs subscribed and delivered blank, . . .	<i>ib.</i>
<i>Onus probandi</i> , ...	227
Blanks do not necessarily vitiate the whole deed, ...	228
Blanks in name of substitute, ...	<i>ib.</i>
Act does not extend to indorsation of bills, etc., ...	229
Blank bills, ...	<i>ib.</i>
Iron scrip, ...	<i>ib.</i>
BLEND FARM, ...	534, 544
Non-entry duty payable in blend holdings, ...	582
Where lands held blend in place of ward, ...	583
Entry of heirs and singular successors, ...	593
BLIND PERSONS—	
Execution of deeds by, ...	44
May take the assistance of notaries, ...	44, 45
Deeds should be authenticated by notaries as well as by parties' own subscriptions, ...	45
Read over to parties before subscription, ...	<i>ib.</i>
Notaries' docquet should express true state of party's defect of vision, ...	<i>ib.</i>
Witnesses should see blind persons sign, ...	45, 46, 53
Excluded from being instrumentary witnesses, ...	47
BOND—	
Of 'great importance,'	38
Where borrower is not to receive whole amount of loan at once, . . .	97, 98
Bonds by parents to children valid though not delivered, ...	102
See <i>Delivery.</i>	
Power of party interdicted to grant personal bonds, ...	131, 132
Bonds or obligations <i>contra bonos mores</i> , ...	136, <i>et seq.</i>
See <i>Unlawful Consideration.</i>	

<i>INDEX.</i>	1135
	PAGE
BOND—continued.	
For gaming debts, ...	146, 147
<i>See Gaming.</i>	
In defraud of creditors, ...	168, <i>et seq.</i>
<i>See Fraud.</i>	
Effect of personal obligation by an Englishman under seal as compared with one not under seal, ...	184, 185
How obligations in favour of Scotch parties by English obligants should be executed, ...	185
Distinction between bond and bill debt, ...	457
Erroneous doctrine of Erskine, that name of creditor in bond may be inserted by one not writer of deed, ...	230
BOND, PERSONAL—	
Debt due on, secured by conveyance of land to trustees, ...	750
Falls under children's claim to legitim, ...	848
<i>See Personal Bond.</i>	
BOND, HERITABLE.	
<i>See Heritable Securities.</i>	
BOND OF ANNUITY.	<i>See Annuity.</i>
BOND AND ASSIGNATION IN SECURITY, ...	1118
BOND AND DISPOSITION IN SECURITY.	
<i>See Heritable Securities.</i>	
BOND OF CAUTION.	
<i>See Caution.</i>	
BOND OF CORROBORATION—	
<i>See Corroboration.</i>	
BOND OF INTERDICTION, ...	131
<i>See Interdiction.</i>	
BOND OF PRESENTATION, ...	509
<i>See Presentation.</i>	
BOND OF PROVISION—	
To wife and children, ...	852, <i>et seq.</i>
<i>See Provision.</i>	
BOND OF RELIEF.	
<i>See Relief.</i>	
'BOOKING,' TENURE OF—	
In Paisley, ...	748
Register of bookings, and search in register, ...	<i>ib.</i>
Titles Act of 1860 applies to lands held by this tenure, ...	<i>ib.</i>
BOTTOMRY, BONDS OF—	
Not within Merchant Shipping Act, and to be conveyed under Moveable Transmission Act of 1862, ...	416
Order of preference when granted by owner, and when by master of ship, ...	<i>ib.</i>
BOUNDARIES OF LANDS.	
<i>See Description—Charter—Part and Pertinent.</i>	
Fluctuating boundary, ...	566

	PAGE
BOUNDING CHARTER—	
Effect of, ...	560
<i>See Description—Charter—Part and Pertinent.</i>	
Fraudulent practice of obtaining charters with enlarged boundaries, ...	686
BREVE TESTATUM, ...	541
BRIBERY—	
Person receiving money to be employed in bribery not liable to account, ...	140, 141
Bond of annuity as a bribe in election of Member of Parliament, ...	141
Corrupt practices will vitiate election of trustee in sequestration, ...	<i>ib.</i>
BRIEVE OF INQUEST, ...	1000
BURDEN, REAL—	
By reservation,—by constitution, ...	1061, 1062
<i>See Heritable Securities.</i>	
In feu-charter.	<i>See Conditions.</i>
In disposition, ...	635
Lands sold under real burden of existing debts, ...	669
Is terce due out of real burdens?	796
BURDENS, PARISH—	
Superior not liable for, ...	599
BURDENS, PUBLIC—	
Obligation of relief in lease, ...	1105
In feu-charter, ...	598
Omission to repeat in charter by progress, ...	687
Division of, between purchaser and seller, ...	645
<i>See Warrandice—Searches of Incumbrances.</i>	
BURGH, ROYAL—	
Burgage tenure, origin of, ...	534, 736
Sasine by town-clerk, ...	608, 609, 739, <i>et seq.</i>
Symbols of infeftment, ...	611
Charter in favour of royal burgh, ...	551
Prescriptive progress of titles, ...	655
Constitution of royal burgh, ...	736
Question whether the burgh or the individual proprietors hold of the Crown, ...	<i>ib.</i>
Town council may grant feus within burgh, ...	737
Individual proprietors cannot, ...	<i>ib.</i>
Entry by resignation, ...	737, <i>et seq.</i>
Disposition of burgage lands, ...	738
Contains no precept of sasine, ...	<i>ib.</i>
Completion of disponee's title, old forms, ...	739, 740
Instrument of resignation and sasine, by whom prepared, ...	739
Registration of instrument, ...	740, 741
If burgh without magistrates, managers appointed by the Court, ...	740
Giving of sasine under Sasines Act of 1845, ...	<i>ib.</i>
Forms under Titles Acts of 1860, ...	740, <i>et seq.</i>
Registration of conveyance, ...	741
Notarial instruments under Titles Act by any notary public, ...	<i>ib.</i>

INDEX.

1137

PAGE

BURGH, ROYAL—*continued.*

Where no register of sasines is kept, ...	742, 743
Assignations of unrecorded conveyances, ...	742
Burgage subjects now affected by terce, ...	796
Completion of heir's title by cognition and sasine, ...	1029
By writ of <i>clare constat</i> and service, ...	1030
Burgh register of sasines not applicable to lands feued by magistrates, ...	1031
No relief exigible on entry to burgage lands, ...	<i>ib.</i>

BUYING—

Offices of public trust, ...	141, <i>et seq.</i>
<i>See Unlawful Contracts.</i>	
The subject of a depending process, prohibited to members of College of Justice, or Inferior Court, ...	151
Sales not annulled, ...	<i>ib.</i>

CALLS—

From shareholders of company, ...	406, 407
<i>See Company.</i>	

CANAL—

As boundary of lands, ...	561
Right to canal implies right to towing-path as accessory, ...	569

CAPITAL PUNISHMENT—

Power of inflicting, attached to heritable jurisdictions, ...	539
---	-----

CAPTION. *See Horning—Personal Diligence Act.*

CASH-CREDIT BOND—

Does not fall under Act of 1696, ...	172
What covered by obligation for interest, ...	245
Narrative and obligation to pay, ...	253
Stipulation as to ascertaining balance, ...	254
Registration for summary diligence, ...	<i>ib.</i>
Stated account may be judicially scrutinized, ...	<i>ib.</i>
Declaration that no suspension pass except on consignment, ...	255
Bond in name of several obligants not signed by all, ...	<i>ib.</i>
Effect of obligant's death or bankruptcy, ...	256
Bond by a company, ...	257
Provisions for changes in company by or to whom bond granted, ...	257, 258
Clause of indemnity of debtors and trustees, ...	258
Liability of partner signing company bond with his own name, ...	<i>ib.</i>
Heritable security for future debt by, ...	1078
Assignment of, ...	1086

See Relief.

CASUALTIES OF SUPERIORITY,

Casualties abolished,—ward, marriage, and recognition, ...	529-531
Subsisting casualties, ...	585
Modification or renunciation of, ...	586
How made to affect singular successor in superiority, ...	587

	PAGE
CASUALTIES OF SUPERIORITY—<i>continued.</i>	
Obligation of relief from, import of clause in Transference of Lands Act, ...	598
See <i>Non-Entry—Relief—Composition—Irritancy ob non solutum canonem—Escheat.</i>	
CAUTION—	
By executor-dative, ...	1035
By judicial factor confirming, ...	1042
By tutors and curators, ...	109
CAUTION, BOND OF—	
Its form, ...	261
See <i>Discussion—Division—Relief.</i>	
For agent's fidelity, ...	271
Obligees must exercise watchfulness, ...	272, 340
Liability of agent for expenses, ...	272
See <i>Cautioner—Assignment—Hypothec.</i>	
CAUTION, JUDICIAL, ...	256
See <i>Suspension.</i>	
CAUTIONER—	
Entitled to interest on interest advanced for principal, ...	245
For cash-credit, ...	270, 271
Rights and liabilities of cautioners for cash-credit, ...	245, 255
Where bound as principal ought to obtain bond of relief, ...	250, 251
Not bound beyond express terms of bond, ...	267
Benefit of discussion, ...	<i>ib.</i>
Assignment by creditor, ...	273, 274, 338
See <i>Hypothec.</i>	
Should only pay after distress and intimation to principal, ...	273
Liberation by acts of creditor, ...	321
Not bound unless principal has signed obligation, ...	338
Freed by prescription or discharge (except in a sequestration) of debt guaranteed, ...	<i>ib.</i>
Plea founded on discharge barred by consent, ...	<i>ib.</i>
See <i>Bankruptcy.</i>	
Freed by creditor's acting prejudicially to him, ...	339
Or on account of creditor's misrepresentation, ...	<i>ib.</i>
Or if conditions of principal obligation varied, ...	340
Gross negligence of obligees frees an agent's cautioner, ...	<i>ib.</i>
Cautionary obligations not struck at by Act of 1621, ...	168
Do securities in relief of cautioners fall under Act of 1696?	170
Cautioner for bankrupt's composition, ...	174-175
Cases of fraud in connexion with cautionary obligations, ...	162-164
CHANCERY PRECEPT—	
Old form of, ...	1003
Where lands in different counties not united into barony, ...	<i>ib.</i>
Security for non-entry duties, ...	<i>ib.</i>
Fell if infetment not taken before next term, ...	<i>ib.</i>
Fell by death of grantor or grantee, ...	<i>ib.</i>
Sheriff of Chancery, ...	1004, <i>et seq.</i>

INDEX.

1139

PAGE

CHANCERY PRECEPT—*continued.*

Modern form of, ...	1006
How obtained under Crown Charters Act, ...	<i>ib.</i>
Writ of <i>clare constat</i> under Titles to Land Act, ...	1007
Operates confirmation of writs requiring confirmation, ...	1010

CHARGE, GENERAL AND SPECIAL.

See Adjudication in Implement.

CHARGE, EXECUTION OF.

See Personal Diligence Act—Registration for Execution.

CHARTER PARTY, ...	417
After-stamping of, ...	197, 198

See Ships.

CHARTER—

ORIGINAL CHARTER—

Superseded <i>breve testatum</i> , ...	542
Distinguished from charter by progress, ...	543
Clauses of, ...	544, <i>et seq.</i>
Granter must be infeft, ...	544
Or registered, ...	1051, 1052
Charters to corporations, royal burghs, unincorporated companies, ...	551
Description of lands, ...	552, <i>et seq.</i>

See Description of Lands.

Acquisition of discontinuous lands as part and pertinent, ...	560
Bounding charter excludes such acquisitions, ...	<i>ib.</i>
Servitudes, ...	562
Clause of parts and pertinents, ...	563

See Part and Pertinent.

(1). Limitations of vassal's rights, ...	570, <i>et seq.</i>
Reservation of minerals, ...	570
Clause of pre-emption, ...	573
Prohibition against subinfeudation, ...	<i>ib.</i>
Erection of houses, etc., ...	<i>ib.</i>
Mode of making conditions effectual, ...	574

See Conditions.

Superior protected where feuar's right personal, ...	577
Superior's agent, ...	576, 581, 1055
(2). Limitations of superior's rights, ...	582, <i>et seq.</i>
Modification or renunciation of casualties, ...	586

Term of entry, ...	589
<i>Tenendas</i> clause, ...	<i>ib.</i>
<i>Reddendo</i> clause, ...	590

See Feu-duty.

Assignment to writs, ...	593
Clause of relief from feu-duties, etc., ...	598
Omission to repeat obligation of relief in charters by progress, ...	687
Clause of warrandice, ...	599
Clause of registration, ...	601

	PAGE
CHARTER— <i>continued.</i>	
Charter by subject-superior can be recorded only in Books of Session, ...	601
Precept of sasine, ...	602
Stamp-duty, ...	604
Delivery of charter, ...	<i>ib.</i>
CHARTER BY PROGRESS, ...	543
Contains no warrandice, ...	688
Effect of delivery without reservation of bygone feu-duties, ...	<i>ib.</i>
Conditions of feu need not be repeated, ...	659
Vassal may insist on reference to <i>tenendas</i> and <i>reddendo</i> , ...	696
Denominational stamp-duties applicable to, ...	193
CHARTER OF ADJUDICATION. See <i>Adjudication.</i>	
CHARTER OF CONFIRMATION. See <i>Confirmation by Superior.</i>	
CHARTER OF RESIGNATION—OF RESIGNATION AND CONFIRMATION. See <i>Resignation.</i>	
CHARTER OF SALE. See <i>Ranking and Sale.</i>	
CHEQUE. See <i>Draft on Banker.</i>	
CHILDREN—	
Provisions to, by antenuptial marriage-contract, ...	814, <i>et seq.</i>
By postnuptial contract, ...	853
Antenuptial provisions as in competition with father's creditors, 168, 169	
Right to legitim and dead's part, ...	797
Provisions to younger children out of entailed estate, 805, 826, <i>et seq.</i>	
Bonds of provision, ...	853
Destination to 'children of marriage,'	998
See <i>Marriage-contract—Entail.</i>	
CHOSE IN ACTION, ...	281
Stamp-duty on assignation of, ...	190
CIRCUMVENTION. See <i>Fraud.</i>	
CLARE CONSTAT—	
Precept of, by subject-superior, ...	1011
Available to heir only, ...	1012
Valid after granter's death, ...	<i>ib.</i>
Sufficient if granted to right party, ...	1015
Involves representation to extent of value of lands, ...	<i>ib.</i>
Charter of confirmation and precept of <i>clare constat</i> , ...	1008
Not now necessary, ...	1010
Writ of <i>clare constat</i> by Crown, ...	1007, 1010
By subject superior, ...	1011, 1012
Creates no mid-impediment to confirmation of last vassal's disponee, 684	
Writ of <i>clare constat</i> in burgage holdings, ...	1031
No casualty exigible, ...	<i>ib.</i>
CODICIL, ...	908
Trustees named by, have benefit of survivorship clause in trust-deed, ...	878

INDEX.	1141
	PAGE
COGNITION AND SALE—	
Process of, at instance of pupil and tutors, ...	773
COGNITION AND SASINE, ...	1029
Founda prescriptive progress of titles, ...	655
Witnesses attest facts and sign each page, ...	1030
Registration of instrument within sixty days, ...	<i>ib.</i>
COGNITIONIS CAUSA DECREE—	
In favour of adjudger in implement, ...	763
Of executor-creditor, ...	1047
COGNOSCING—	
In cases of insanity or idiocy, ...	117, <i>et seq.</i>
COLLATERALS—	
Intestate succession among, ...	860, <i>et seq.</i>
COLLATION—	
In intestate succession, ...	797, 799, 861
Not confined to cases of absolute intestacy, ...	862
COLLUSION.	<i>See Fraud.</i>
COMMISSARY COURTS—	
Instituted in place of old Church Courts, ...	211, 494, 1032
Instructions to Commissaries, issued in 1563, ...	211
Registration for preservation and execution in, prohibited, ...	216
Custody of registers, ...	<i>ib.</i>
<i>See Registration—Diligence, Personal—Confirmation of Executor.</i>	
COMMISSION—	
To convey lands, not executed according to law of Scotland, ...	85
<i>See Factory.</i>	
COMMISSION OF BANKRUPTCY.	<i>See Bankruptcy.</i>
COMMON AGENT—	
In process of ranking and sale, ...	772
Cannot purchase, ...	150
COMMON DEBTOR, ...	514
COMMUNION OF GOODS, ...	796, 797
COMPANIES ACT, 1862—	
Analysis of, ...	391-408
Authentication of memorandum and articles of association, ...	92
<i>See Joint-stock Companies.</i>	
COMPANY—	
Bonds in favour of, ...	253
Contract giving company right of pre-emption of shares to be strictly implemented, ...	310
Such right not pleadable by third parties, ...	<i>ib.</i>
Distinction between, and 'firm,'	373
Registered and unregistered, ...	<i>ib.</i>
Limits of business, how determined, ...	374
Firm, or descriptive name, ...	375

	PAGE
COMPANY—continued.	
Effect of partner withdrawing, ...	376
Partner's death operates dissolution, ...	<i>ib.</i>
His bankruptcy a ground for requiring dissolution, ...	<i>ib.</i>
Rights of insolvent partners, ...	<i>ib.</i>
Circumstances in which dissolved by Court, ...	377
Contributions beyond capital, ...	378
Shares and liabilities held equal unless otherwise proved, ...	378, 379
Partner's powers to bind company, ...	378, 385, 386
Company entitled to profit of a partner's venture in his own name, ...	378
Presumption that partner acts for company in acquiring rights, ...	<i>ib.</i>
Presumption that profit and loss to be divided according to stock, ...	379
Settlement with partner's representatives, ...	381
Partner's death does not affect appointment of arbiter for winding up, ...	382
Indivisible property to be publicly sold, ...	<i>ib.</i>
Appointment of judicial factor to realize, ...	384
May be constituted without writing, ...	383
Separate <i>persona</i> exists till wound up, ...	<i>ib.</i>
Not capable of holding feudal, but may hold leasehold, property, ...	384
<i>See Heritable and Moveable—Arrestments.</i>	
If partner cannot withdraw his funds, his creditors cannot arrest, ...	<i>ib.</i>
Company's moveables cannot be poinded for partner's debts, ...	<i>ib.</i>
Liability of company and partners for company debts, ...	385
Retirement of partners, ...	<i>ib.</i>
Partner's liability for company debts, ...	384, 386
Debts must be constituted against company before partner sued, ...	386
<i>See Copyright—Bankruptcy.</i>	
<i>Delectus personæ</i> preventing introduction of new partners, ...	404
Can sue in name of firm, ...	405
Director of public company not entitled to enter into contracts with company, ...	150
COMPENSATION—	
Extinction of obligations by, ...	320
Must be pleaded, ...	<i>ib.</i>
Does not arise if claim founded on is a debt assigned by unimputed assignation, ...	293
Cannot be pleaded against bank draft, ...	489
COMPLETION OF TITLE—	
By purchaser, ...	679, <i>et seq.</i>
By confirmation, ...	680
Distinction between <i>sasine on a me</i> and on <i>a me vel de me</i> disposition, ...	680, 681
<i>See Confirmation by Superior.</i>	
By resignation, ...	685, <i>et seq.</i>
<i>See Resignation.</i>	
Distinctive peculiarities of resignation and confirmation, ...	690

COMPLETION OF TITLE—*continued.*

Error in completing title by resignation in place of confirmation,	
how rectified, ...	693, <i>et seq.</i>
Under Titles Acts, ...	696, <i>et seq.</i>
By purchaser of superiority, ...	703
By assignee under Titles Act, 1858, ...	709
Where superior has acquired property-fee, ...	725
In burgage lands, ...	739, <i>et seq.</i>
By trustee in sequestration, ...	755, <i>et seq.</i>
By adjudger in implement, ...	760
By purchaser at judicial sale, ...	771
By wife to her jointure, ...	803
To locality provision, ...	807
By general disponee, ...	871, 872
By testamentary trustees, ...	925
By judicial factor, ...	927
By heirs-at-law, ...	998, <i>et seq.</i>
In lands held of Crown, ...	1000, <i>et seq.</i>
In burgage lands, ...	1029, <i>et seq.</i>

See *Heir.*

By creditor under bond and disposition in security, ...	1074
---	------

COMPOSITION—

ON ENTRY OF SINGULAR SUCCESSOR, ...	584
In tailzied investiture, ...	1053, 1054
By <i>pro indiviso</i> proprietors, ...	1054
Due by trustees entering for behoof of heir, ...	1055
Origin of, ...	536
How ascertained, ...	1057
Where lands subfeued, ...	<i>ib.</i>
Deduction for teinds, ...	1058
Taxed composition, ...	<i>ib.</i>
Assignees before infestment, ...	<i>ib.</i>
May bear interest, ...	1059
IN BANKRUPTCY, ...	174, 175
Discharge on composition, ...	323
Without composition, ...	<i>ib.</i>
Judicial discharge not evacuated though composition not paid, ...	<i>ib.</i>
Creditors in second sequestration rank only for unpaid composition, ...	<i>ib.</i>
Creditors may make extrajudicial discharge conditional on pay- ment of composition, ...	<i>ib.</i>
Cautioner not freed by creditor assenting to composition, ...	338, 339
Discharge of principal under composition contract, ...	<i>ib.</i>
Clause in contract for protection of cautioners, ...	275

CONCEALMENT.

See *Fraud.*

CONDITIO SI SINE LIBERIS—

Implied in destinations, ...	781, 840, 856, 857
In grants of legacies, ...	914, 921

CONDITIONAL INSTITUTE.

See *Institute—Service.*

	PAGE
CONDITIONS IN FEU-CHARTER—	
Clause of pre-emption and prohibition against subinfeudation, ...	573-579
Feuing conditions, ...	573
Mode of making conditions effectual— <i>Coutts' case</i> , ...	574, <i>et seq.</i>
Conditions must affect the lands, ...	574
Must appear on Register of Sasines, ...	<i>ib.</i>
Must be legal, and have natural connexion with subject, ...	575
When a sum of money is the burden, ...	<i>ib.</i>
Prohibition of nuisances, ...	<i>ib.</i>
Objects and effect of irritant clause, ...	575-577
Resolutive words unnecessary, ...	576
Registration of conditions, how accomplished, ...	<i>ib.</i>
Stipulation that superior's agent shall register charter, ...	576, 1055
Conditions appointed to be engrossed in subsequent investi- tures, ...	577
Where feuar has only personal right, ...	<i>ib.</i>
Contravention of conditions, ...	578
Strict interpretation of conditions, ...	579
Entry of vassal's disponees, ...	580
Superior must have an interest to enforce conditions, ...	581
He must not create monopolies, ...	<i>ib.</i>
Superior's agent, ...	<i>ib.</i>
Conditions need not be repeated in charters by progress, ...	659
CONFIRMATION OF EXECUTOR—	
Its objects, ...	1032
Originally granted by Bishops' Courts, ...	<i>ib.</i>
Commissary Courts introduced after the Reformation, ...	<i>ib.</i>
Sheriff is now commissary, ...	<i>ib.</i>
Where deceased died domiciled in or out of Scotland, ...	<i>ib.</i>
Executor-nominate, ...	1033
May be confirmed while deed containing his appointment is under challenge, ...	<i>ib.</i>
Executor-dative, old and new forms of procedure for appointment of, ...	<i>ib.</i>
Inventory of deceased's personal estate, ...	1035
What estate must be included in inventory, ...	<i>ib.</i>
Oath to inventory, ...	<i>ib.</i>
Before whom taken, ...	<i>ib.</i>
Testament testamentar or dative, ...	<i>ib.</i>
English and Irish estate included in Scotch inventory, ...	1037
Scotch estate included in English and Irish probate and letters of administration, ...	<i>ib.</i>
Inventory stamp, ...	1038
Money secured on heritable property liable for duty, ...	<i>ib.</i>
Property sworn to as at date of giving up inventory, ...	<i>ib.</i>
Proceeds accrued included, ...	<i>ib.</i>
Return of inventory duty, ...	<i>ib.</i>
May be claimed within three years, ...	1039
Debts must be paid, and payable out of moveable estate, ...	<i>ib.</i>

INDEX.

1145

PAGE

CONFIRMATION OF EXECUTOR—*continued.*

Where heritable debts exceed value of heritable estate, the balance authorizes claim for return of duty, ...	1039
Return of duty in respect of overvalued estate, ...	<i>ib.</i>
Eik to confirmation, ...	<i>ib.</i>
Additional estate includes improved value of original estate, ...	<i>ib.</i>
Undervalued estate remains in <i>hereditas</i> of deceased to extent of sum understated, ...	1040
Stamp-duty on additional inventory, ...	<i>ib.</i>
Confirmation <i>ad omissa et male apprehiata</i> , ...	<i>ib.</i>
By whom applied for, ...	1041
If not by original executor, petition must be intimated to him, ...	<i>ib.</i>
Confirmation of pupil or minor, ...	<i>ib.</i>
Of factor for pupil or minor, ...	<i>ib.</i>
Factor finds caution, ...	1042
Executor abroad, ...	<i>ib.</i>
Judicial factor may be confirmed executor-dative, ...	<i>ib.</i>
Preference in competition for office of executor-dative, ...	<i>ib.</i>
Effect of confirmation, ...	1043
Payment to executor before confirmation, ...	<i>ib.</i>
To next-of-kin dying unconfirmed, ...	1043, 1044
Claims of doubtful value, ...	1044
Where deceased bound to grant assignation, ...	<i>ib.</i>
Death of executor,—executor <i>ad non executa</i> , ...	1045
See <i>Executor—Executor-Creditor.</i>	
Where confirmation unnecessary, ...	1049

CONFIRMATION BY SUPERIOR—

Effect of, ...	680
Operates <i>retro</i> , ...	683
Contrasted with resignation, ...	690
Anciently used to protect vassal from consequences of his immediate superior's forfeiture, ...	684
Charter of confirmation, ...	681
Effect of confirming a series of dispositions, ...	682
Enactments of Lands Transference Act, ...	<i>ib.</i>
Confirmation after or before infeftment, ...	682, 683
Where two infeftments, the first confirmed excludes the other, ...	683
Unconfirmed sasine creates no mid-impediment, ...	<i>ib.</i>
Nor precept of <i>clare constat</i> to heir of last vassal, ...	684
Superior bound to grant charter of confirmation, ...	<i>ib.</i>
Confirmation operated by charters of resignation, adjudication, and sale, ...	688
Vassal may now insist on reference to <i>tenendas</i> and <i>reddendo</i> in charter of confirmation, ...	696
Writ of confirmation by subject superior, ...	697
Authentication of, ...	699
Crown writ of confirmation, ...	705
Charter of confirmation and precept of <i>clare constat</i> , ...	1008
Not now necessary, ...	1010

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INDEX.

1147

PAGE

CONSOLIDATION—*continued.*

Extinction of vassal's right when superior possesses <i>dominium utile</i> under superiority titles for forty years, ...	731
Superior may acquire part of property fee contained in vassal's infeftments, ...	<i>ib.</i>
Forfeiture and relinquishment of superiority.	
See <i>Superiority.</i>	

CONSTITUTION—

Action of, by adjudger. See <i>Adjudication in Implement.</i>	
By executor-creditor, ...	1047
Liferenter by constitution, ...	1052
Real burden by constitution, ...	1062
See <i>Heritable Securities.</i>	

CONTRACT—

When personal, construed according to <i>lex loci contractus</i> , ...	88
Expense of stamping mutual contract falls on parties equally, ...	199
Mutual contract, where transaction completed, requires no delivery, ...	103
Of ground-annual. See <i>Ground-Annual.</i>	
Of marriage. See <i>Marriage-Contract.</i>	
Of sale. See <i>Sale.</i>	
See <i>Unlawful Contracts.</i>	

CONTRAVENTION—

Of entail, consequences of, ...	973
See <i>Entail.</i>	

CONVENTIONAL TERMS. See *Assignment to Rents.*

CONVEYANCE—

Stamp-duties applicable to deeds falling under general title of 'conveyance,'	190
Conveyances relating to bankrupt's estate, exempt from stamp-duty, ...	195

COPARTNERY—

Contract of, ...	372
One individual cannot constitute, ...	373
Nor same individuals separate partnerships, ...	<i>ib.</i>
Narrative of contract, ...	374
Power to substitute new partners, ...	<i>ib.</i>
Place of business,—firm, ...	375
See <i>Firm—Company.</i>	
Provisions as to use of firm on expiry of contract, ...	376
Endurance of contract, ...	<i>ib.</i>
Declarations as to capital stock and partners' shares and liabilities, ...	378, 379
Provisions as to partners' powers and duties, ...	378
Partner's death, insolvency, or bankruptcy, ...	380
Power to alter agreement, ...	381
Winding up, ...	<i>ib.</i>
Clause of reference of disputes, ...	383
Registration clause to apply to alterations and decrees-arbitral, ...	<i>ib.</i>

	PAGE
DEEDS—continued.	
Ancient mode of writing in the form of a roll, ...	32
Deeds written bookwise, ...	<i>ib.</i>
Execution by blind persons, ...	44
<i>See Blind Persons.</i>	
Re-execution of deeds with alterations, ...	50, 72
Deeds partly written, partly printed, ...	58, 223
Place of signing, ...	60
Date, ...	61
Watermark of paper, ...	<i>ib.</i>
Execution on Sunday, ...	<i>ib.</i>
Distinction between private deeds and diligence executed on Sunday, ...	<i>ib.</i>
Alterations in deeds. <i>See Vitiations.</i>	
Duplicate deeds referring to each other, ...	64
Deeds privileged as to authentication, ...	73, <i>et seq.</i>
<i>See Privileged Writings.</i>	
Deeds executed informally, ...	78, <i>et seq.</i>
Cases where statutory solemnities dispensed with, ...	79
Adoption of informal writing as part of probative deed, ...	80
Additional solemnities prescribed by party himself, ...	82
Deeds executed by foreigners according to law of domicile, and by Scotchmen according to law of place of execution, ...	83, <i>et seq.</i>
<i>See Foreign.</i>	
Special statutory forms of authentication, ...	91, <i>et seq.</i>
Deeds by English and Scotch obligants, and by English obligants in favour of Scotchmen, ...	184, 185
Delivery and acceptance of, ...	95, <i>et seq.</i>
<i>See Delivery of Deeds.</i>	
Not admissible in evidence until stamped, except in criminal proceedings, or as evidence of a fact, ...	188, 198
Rules as to Stamp-duty, ...	188
Liable according to real nature of transaction, ...	190
Falling under general title 'conveyance,'	<i>ib.</i>
Separate obligations or transactions embraced in one deed, ...	191
'Deed' stamp, ...	193
'Deed' distinguished from 'will,'	<i>ib.</i>
Objection of want of proper stamp, ...	195
After-stamping, ...	196
<i>See Stamp.</i>	
Tenor of unstamped deed cannot be proved, ...	199
Clauses common to most deeds, ...	200, <i>et seq.</i>
DELECTUS PERSONÆ—	
In contract of copartnery, ...	373, 374
In joint-stock company, ...	404
In lease, ...	1102
DELEGATION—	
Extinction of obligations by, ...	336
Arises by transfer of assignable lease, ...	<i>ib.</i>

INDEX.

1153

PAGE

DELEGATION—*continued.*

Rights of landlord and old and new tenants, . . .	336
Arises by entry of new vassal with superior, . . .	591

DELIVERY OF DEEDS—

General rules, ...	95
Deeds deposited with third parties, ...	96
When holder of deed is agent for granter and grantee, . . .	96, 97
Case of partial delivery of bond, ...	97
When borrower is not to receive full amount of loan at once, . .	<i>ib.</i>
Distinction between onerous and gratuitous deeds when depositary is not agent for both parties, ...	98
Proof of warrantable possession, ...	<i>ib.</i>
Effect of delivery, ...	99
Exceptions from rule requiring delivery during life of granter, . .	101
Where granter has interest in deed, ...	<i>ib.</i>
Testamentary writings, ...	<i>ib.</i>
Clause dispensing with delivery, ...	102
Bonds by parents to children, ...	<i>ib.</i>
Postnuptial settlement by husband in favour of wife, ...	<i>ib.</i>
Antecedent obligation to execute deed, ...	103
Mutual contracts, ...	<i>ib.</i>
Decree-arbitral, ...	104
Equivalents to delivery, ...	104, 105
Registration for preservation not <i>per se</i> equivalent, ...	105
Judicial ratification by wife does not infer delivery, ...	<i>ib.</i>
Delivery of feu-charter, ...	604
Seller of lands has security over them for the price till disposition delivered, ...	650
Delivery of charter by progress, or of disposition of superiority to vassal, implies discharge of bygone feu-duties, ...	688, 703

DELIVERY OF SASINE—

Objects and uses of symbolical delivery, ...	606
Its necessity as to lands, ...	542
Changes introduced in 1845, ...	543

See Charter—Sasine.

DEMURRAGE, ...	417
----------------------	-----

DENOMINATIONAL STAMP, ...	193
---------------------------------	-----

DENUNCIATION—

Of debtor, ...	498
Registration of execution of charge now equivalent to, ...	507

See Horning—Personal Diligence Act.

DEPOSIT-RECEIPT—

Does delivery of, to bank, operate discharge?	331
Bequest of sum in, ...	913

DESCRIPTION—

Of lands, in charters, dispositions, etc., ...	552, <i>et seq.</i>
In bond and disposition in security, ...	1068, 1069

DESCRIPTION— <i>continued.</i>	PAGE
General description, ...	552
Reference to disponent's titles, etc., ...	553
What required to liquidate description of lands described as all those belonging to disponent, ...	553, 603
Leading name and reference under Titles to Land Acts, ...	554, <i>et seq.</i>
Exceptions from description, ...	558
New descriptions, ...	<i>ib.</i>
Where part only of estate conveyed, ...	<i>ib.</i>
Building areas, ...	559
Effect of description by boundaries, ...	560
Lands described as in a particular parish or county, ...	<i>ib.</i>
Where boundary is 'the sea,' 'sea shore,' 'sea beach,' 'flood mark,' 'sea flood,' 'full sea,'	560, <i>et seq.</i>
Where boundary is a canal or lake, ...	561
Boundaries control measurement, ...	562
Discrepancies between actual quantity and extent specified, ...	<i>ib.</i>
Where boundary is a line between march stones, ...	<i>ib.</i>
Where a wall or a stream is the boundary, ...	563, 564
Specification of parish and county, ...	569
General disposition without description sufficient warrant for real right, ...	871
Description of lands in entail, ...	942
DESERTION—	
Wife's rights under 'Conjugal Rights Amendment Act,'	793
DESTINATION—	
Construction of destinations of heritage, ...	776, <i>et seq.</i>
Effect given to intention, ...	776
Signification of technical terms, ...	<i>ib.</i>
Conjunct rights to spouses, ...	777
Presumption in husband's favour, ...	<i>ib.</i>
Exceptions from that presumption, ...	<i>ib.</i>
Effect of power of disposal given to one of the spouses, ...	778
Exclusion of husband's creditors, ...	<i>ib.</i>
Fee in spouse whose heirs favoured, ...	<i>ib.</i>
To survivor of spouses, ...	779
To heir of their marriage, ...	<i>ib.</i>
Same rules not applied to moveables, ...	<i>ib.</i>
Division presumed, ...	<i>ib.</i>
Conjunct rights to parent and child, ...	780
Presumption in favour of parent, ...	<i>ib.</i>
Where parent has power of disposal or burdening, ...	<i>ib.</i>
Deed granted by parent to himself, ...	781
To parent in liferent, and children born or to be born in fee, ...	<i>ib.</i>
Implied condition <i>si sine liberis</i> , ...	<i>ib.</i>
Where children are <i>nominatim</i> fiars, ...	<i>ib.</i>
Children in existence may be fiars subject to future births, ...	<i>ib.</i>
In liferent allenary, ...	782

INDEX.

1155

DESTINATION—*continued.*

PAGE

Liferent of interest of money, ...	782
Special trust-deed for parent in liferent and children in fee, ...	783
General trust-deed will not receive same effect, ...	<i>ib.</i>
Fee cannot be <i>in pendente</i> , ...	<i>ib.</i>
Fiduciary fee, ...	784
By married persons to one another in liferent and children in fee, ...	785
In a lease cannot be altered by institute, ...	<i>ib.</i>
Conjunct rights generally—where parties not in relation of husband and wife, or parent and child, ...	<i>ib.</i>
To A. and B. equally in liferent, and B. and his heirs in fee, ...	786
Deeds construed as a whole, ...	790
To 'heirs' in original charter, ...	549
'To A.' equivalent to 'to A. and his heirs or assignees,'	<i>ib.</i>
In entail, ...	989
May now be referred to, ...	941
<i>See Entail.</i>	
Not altered by instrument of dis entail, ...	971
May be in separate deed, ...	989
Alteration of, ...	<i>ib.</i>
To heirs-male, ...	993
To heir-male of the body or of a marriage, ...	994
To heir-female, ...	995
To heirs-whosoever, ...	996
To heirs and bairns, etc., ...	997
Executive clauses will not overrule dispositive, but may supply omission, ...	995

See Service.

DEVOLUTION—

Clause of, in entail, ...	940
By arbiters on oversman, ...	366, 367

DIES INCERTUS PRO CONDITIONE HABETUR, ... 856, 918

DILIGENCE—

Execution of, on Sunday, is null, except as to <i>meditatio fugæ</i> warrants, ...	61
Wife's person exempt from, ...	125
Cases where wife liable to diligence, ...	<i>ib.</i>

Registration for execution.

See Registration for Execution—Summary Diligence.

Separate letters necessary for diligence against real and personal estate, ...	220
--	-----

REAL DILIGENCE. *See Inhibition—Adjudication—Poinding the Ground.*

PERSONAL DILIGENCE—

Origin and meaning of 'diligence,'	491
History of imprisonment for debt, ...	493
Act of warding, ...	<i>ib.</i>
Powers of Church Courts, ...	<i>ib.</i>
Excommunication of debtor, ...	<i>ib.</i>

	PAGE
DILIGENCE—continued.	
Decrees of Commissary Courts, ...	494
Letters of four forms, ...	<i>ib.</i>
Consent to letters of horning on single charge, ...	<i>ib.</i>
Decree conform, ...	<i>ib.</i>
Abolition of letters of four forms, ...	495
Fictitious rebellion of debtor, ...	<i>ib.</i>
Personal Diligence Act does not abolish old forms of denuncia- tion, etc., ...	244
See <i>Horning—Poinding—Personal Diligence Act—Exchequer Act—Arrestment—Furthcoming.</i>	
DIRECTION, CLAUSE OF—	
Under Titles to Land Act, 1858, ...	631, 632
Under Titles to Land Act, 1860, ...	742
Useful in marriage contract, ...	803
DIRECTIONS, DEED OF—	
Executed with reference to separate deed, ...	87
Directions to entail, ...	977
See <i>Trust-Disposition and Settlement.</i>	
DIRECTORS OF COMPANIES—	
Their liability under Act of 1856 for paying dividends while insolvent, ...	404
Alterations in Act of 1862, ...	<i>ib.</i>
Not entitled to enter into contracts with company, ...	150
DISCHARGE OF PERSONAL OBLIGATIONS—	
Ought to be accompanied by delivery of vouchers, etc., ...	321, 322
When indorsed on unrecorded bond, ...	321
Registration clause to specify no number of days of charge, ...	322
When granted by an assignee, ...	<i>ib.</i>
Question if an indorsed discharge requires receipt-stamp, ...	<i>ib.</i>
After-stamping, ...	197
When discharge is of consent, ...	322
Judicial discharges under Bankrupt Act, ...	323
See <i>Bankruptcy—Aliment.</i>	
General and special discharge, ...	324
Exceptions arising from ignorance of legal rights, ...	325, 328
Material error as to rights, ...	156
Debts due but not payable included in general discharge, ...	325
What debts are not included, ...	326, 327
General discharge arising by wife's accepting a bond of provision not extended to mournings or aliment, ...	327
Party acknowledging that full payment not made on receiving dis- charge, bound to show payment of balance, ...	328
Though receipt granted, money can be proved still due, ...	<i>ib.</i>
Where discharge subject to condition, ...	329
Minor without curators cannot give effectual discharge, ...	<i>ib.</i>
Debtor should make consignation in such cases, ...	<i>ib.</i>

DISCHARGE OF PERSONAL OBLIGATIONS—*continued.*

PAGE

Interest of debts required for minor's maintenance may be discharged by him, ...	329
Discharge by tutors after expiry of office invalid, ...	<i>ib.</i>
Circumstances in which <i>bond fide</i> payment to one not the proper creditor operates discharge, ...	329, 330
Payment to factor, ...	331
Question whether delivery of deposit-receipt to bank sufficient, ...	<i>ib.</i>
Where debtor bound in several characters, discharge otherwise than on full payment in one character does not relieve him in others, ...	332
Payment presumed to be made by proper debtor, ...	<i>ib.</i>
Others should get discharge with obligation to assign debt and security, ...	<i>ib.</i>
Circumstances in which agents held to have lost right to assignation, ...	332, 333
<i>See Assignment.</i>	
Discharge and assignation combined, ...	342
To be intimated to principal and co-obligants, ...	<i>ib.</i>

DISCUSSION—

DISCUSSION OF HEIRS, ...	234
Effect of renouncing its benefit, ...	235
Discharge of heirs not primarily liable may be express or implied, ...	<i>ib.</i>
Order of liability of heirs, ...	235-237
Heir of conquest may be sued by heir of line, who is a creditor, and renounces to be heir, ...	236
Heirs of a marriage and other heirs of provision and tailie liable only to value of succession, ...	<i>ib.</i>
When debts laid on special heir, he may be sued without notice to heir of line, ...	237
Heirs bound <i>subsidiarie</i> may require discussion of others, ...	<i>ib.</i>
Catholic security over lands falling partly to heir of line, partly to heir-male, affects them proportionally, ...	<i>ib.</i>
Heirs in moveables not entitled to benefit of discussion, ...	<i>ib.</i>
Creditor in personal debt not bound to discuss them first, ...	<i>ib.</i>

DISCUSSION OF PRINCIPAL DEBTOR—

Renunciation of its benefit unnecessary in obligations for interest only, ...	251
Until 1856, cautioner might require, ...	262
Alteration made by Mercantile Law Amendment Act, ...	<i>ib.</i>
Cautioner not liable for expense of discussion unless stipulated, ...	267
Generally excluded in judicial cautionries, ...	268
Excluded by principal being bankrupt or furth of Scotland, without goods, ...	<i>ib.</i>
But heirs may be discussed if he has died, ...	<i>ib.</i>
Benefit renounced by cautioners binding themselves as principals, ...	269

DISSENTAIL—

In the case of old entails, ...	969
New entails, ...	970

	PAGE
DISENTAIL—continued.	
Consents to disentail irrevocable, ...	970
Instrument of disentail, ...	<i>ib.</i>
Recorded with decree in Register of Entails, ...	<i>ib.</i>
Death of petitioner, ...	971
Instrument does not alter destination, ...	<i>ib.</i>
Disentail with a view to new entail, ...	<i>ib.</i>
Where descent of estate secured by marriage-contract to issue of marriage, ...	972
Consents by guardians for pupils, minors, etc., ...	<i>ib.</i>
Money invested in trust for purchasing land to be entailed may be acquired in fee-simple, ...	978
DISPENSATION, CLAUSE OF, ...	616
'DISPONE'—	
In conveyances of land, ...	547-549
Distinction between onerous and gratuitous conveyances, ...	<i>ib.</i>
In general disposition and settlement, ...	866, 867
Not necessary in conveyance of lease, ...	1112
DISPOSITION—	
Of heritage, authentication of, ...	84
<i>Mortis causa</i> conveyance, ...	84-87
<i>Mortis causa</i> conveyance by minor, ...	114
By married woman, ...	126
By interdicted person, ...	132
By outlaw, ...	134
<i>Mortis causa</i> dispositions exempt from stamp-duty by 23 & 24	
Vict. cap. 15, ...	193
Act not retrospective, ...	<i>ib.</i>
Clauses of disposition, ...	633, <i>et seq.</i>
Warrandice, ...	205
<i>See Warrandice.</i>	
May be recorded in any register, ...	646
Expenses of, paid by seller and purchaser equally, ...	674
Description of lands, ...	552, <i>et seq.</i>
Clause of 'all right, title, and interest,' etc., ...	570
Completion of disponee's title, ...	647
Conveys no right until delivered, ...	650
Disposition to purchaser's assignee, ...	653
DISPOSITION OMNIUM BONORUM—	
Exemption from stamp-duty, ...	195
DISPOSITION AND ASSIGNATION, ...	706
Need not contain clause disposing the lands, ...	707
New forms under Titles Act of 1858, ...	708
Assignment written apart from or on conveyance, ...	<i>ib.</i>
Stamp-duty on assignation under Titles Act, ...	715
Completion of assignee's title, ...	709
Assignee ought to make his right real without delay, ...	715

INDEX.

1159

PAGE

DISPOSITION AND ASSIGNATION—*continued.*

Granter of, not thereby divested of his personal right, ...	715-718
Assignment under Titles Act 1860, ...	742

DISPOSITION AND SETTLEMENT, ... 864

See Testament—Executor.

DISPOSITION AND SETTLEMENT, GENERAL—

Words of <i>de præsenti</i> conveyance necessary to convey heritage, ...	866
<i>Lex loci rei sitæ</i> , ...	873
Exclusion of heir, how accomplished, ...	866
Dispositive clause, ...	867
May embrace moveables, ...	<i>ib.</i>
Exemption from stamp-duty, ...	<i>ib.</i>
Description of estate conveyed, ...	<i>ib.</i>
Heir-at-law may be burdened by, though not by simple testament, ...	869
Doctrine of approbate and reprobate, ...	870
Special assignation of particular effects, ...	<i>ib.</i>
Special conveyance of heritable bonds, ...	<i>ib.</i>
General disposition of lands is sufficient warrant for obtaining real right, ...	871
Completion of general disponee's title, ...	871, 872
Provisions to wife and children made real or preferable burdens, ...	872
Disposition under burden of testator's debts, ...	<i>ib.</i>
Does not operate revocation of special legacy, ...	912
Sufficient title to bonds including executors, ...	925

See Trust-Disposition and Settlement—Revocation.

DISPOSITION OF SUPERIORITY, ... 700

Assignment of feu-duties, ...	<i>ib.</i>
Exception of feu-rights from warrandice, ...	<i>ib.</i>
Ought to contain alternative manner of holding, ...	700, 701
Ought to convey 'the lands,'	702
Delivery of, to vassal, implies discharge of bygone feu-duties, ...	703

DISPOSITIVE CLAUSE—

In charter, ...	547
Words of <i>de præsenti</i> conveyance necessary, ...	547, 548
Effect of discrepancies between dispositive and executive clauses, ...	550
Dispositive the ruling clause, ...	<i>ib.</i>
In dispositions, ...	634

DIVISION—

Of children's marriage-contract provisions, ...	837, <i>et seq.</i>
<i>See Marriage-Contract.</i>	

DIVISION, BENEFIT OF, ... 262

DIVISION AND SALE—

Action of, at instance of heirs-portioners or joint proprietors, ...	774
Where competent, ...	<i>ib.</i>
May be raised by trustee, ...	<i>ib.</i>
Proof required that division impracticable, ...	775

	PAGE
DOCQUET—	
By notaries signing for party unable to write, ...	40, 42
Contents of, annexed to sasines in old form, ...	612
Essentials of docquet on sasine, ...	615
Errors in grammar immaterial, ...	<i>ib.</i>
DOMINIUM UTILE AND DIRECTUM, ...	528
Consolidation of, by prescription, ...	731
DONATION—	
<i>Inter virum et uxorem</i> , ...	851
By indorsing bill, ...	487
DRAFT OF DEED—	
Use of, in adjusting missives, ...	187, 563
Draft of settlement allowed no effect, ...	905
DRAFT ON BANKER—	
Has privileges of writings <i>in re mercatoriâ</i> , ...	90
Liable in penny stamp-duty, ...	194, 488
After-stamping incompetent, ...	197
Banker paying on unstamped draft cannot recover from debtor's cautioners, ...	488
Forged indorsation of draft payable to order or on demand, ...	<i>ib.</i>
Draft payable to bearer may be indorsed, ...	<i>ib.</i>
Liability of indorser, ...	<i>ib.</i>
Banker bound to pay if he has funds of drawer, ...	<i>ib.</i>
When must draft be presented, ...	<i>ib.</i>
Crossed cheques, ...	489
Compensation cannot be pleaded against bank draft, ...	<i>ib.</i>
Protest, whether competent, ...	<i>ib.</i>
Vitiations, ...	490
DRAINAGE ACTS—	
Powers conferred by, on tutors and curators, ...	122
DRUNKENNESS—	
Incapacity to contract, arising from, ...	133
DUPLICATE—	
Execution of duplicate deeds with mutual references to each other, ...	64
EDICTAL, ...	298
Intimation of assignation, ...	298, 299
	<i>See Intimation.</i>
ELDEST—	
'Eldest daughter or heir-female,'	995
EIK TO CONFIRMATION, ...	1039
	<i>See Confirmation of Executor.</i>
ENGLISH LANGUAGE—	
In charters, ...	544, 705
ENLISTMENT—	
Of apprentice bound under indenture, ...	348

INDEX.

1161

ENTAILS—

PAGE

Formerly of three classes, ...	934
Simple destinations, ...	<i>ib.</i>
Destinations with prohibitions, ...	935
Introduction of irritant and resolute clauses, ...	<i>ib.</i>
Strict entails,—1685, cap. 22, ...	936
Changes introduced by Entail Amendment Act, ...	<i>ib.</i>
As to disentailing, ...	<i>ib.</i>
As to imperfect entails, ...	937
Entail Amendment Act not retrospective, ...	<i>ib.</i>
Its provisions as to tutors and curators <i>ad litem</i> , etc., ...	121
Old and new entails, how far alike, ...	938
Distinctions between old and new entails, ...	944
Granter ought to have real right, ...	939
Destination must be to special class of heirs, ...	<i>ib.</i>
Destination to A. B. and his heirs whomsoever not an entail, ...	<i>ib.</i>
Clause of devolution, ...	940
Destination to successive liferenters after fiars, ...	941
Destination by reference, ...	<i>ib.</i>
What subjects can be entailed, ...	<i>ib.</i>
Leases, ...	<i>ib.</i>
Moveable effects, ...	<i>ib.</i>
Description of lands, ...	942
Register of entails must specify lands, ...	<i>ib.</i>
Entail of a barony, ...	<i>ib.</i>
Of <i>pro indiviso</i> right, ...	943
Entails dated before Titles Act 1858 must contain prohibitions, ...	944
Clause of registration in Register of Entails now equivalent to prohibitions duly fenced, ...	944, 964
Requisites of all entails, ...	945
Conditions must be inserted, reference being insufficient, ...	946
Obligation to bear surname, arms, and designation of entailer, ...	<i>ib.</i>
Surname of entailer need not be used in signing deeds, ...	36
Obligation to record entail, etc., ...	946
Strict interpretation, ...	946-948
Heir in possession is fiar, so far as not fettered, ...	948
PROHIBITIONS, ...	<i>ib.</i>
Must embrace all members of tailzie, ...	<i>ib.</i>
Institute, ...	948-951
Entailer ought to name himself institute, ...	<i>ib.</i>
'Heirs of entail' do not include institute, ...	<i>ib.</i>
Except under Aberdeen Act, ...	802, 951
Conditional institute, ...	949
Party called as substitute becoming institute, ...	<i>ib.</i>
Terms of destination construed as at date of entail, ...	<i>ib.</i>
Service as heir of provision under entail, ...	950
Prohibition against altering succession, ...	952
Prevents addition to destination, ...	<i>ib.</i>
Alteration by making new entail, ...	<i>ib.</i>

ENTAILS— <i>continued.</i>	PAGE
Prohibition against alienation, ...	953
Prevents granting feu rights and long leases, ...	954
Mansion-house may be let during lessor's lifetime, ...	<i>ib.</i>
Heir of entail may cut and sell wood ripe for cutting, ...	<i>ib.</i>
Propulsion of fee is not alienation, ...	<i>ib.</i>
Prohibition against contracting debt, ...	955
Does not strike at personal debts, ...	<i>ib.</i>
Heir of entail may assign rents in security of debt, ...	<i>ib.</i>
Assurance on life of heir, ...	<i>ib.</i>
Prohibition against adjudications, ...	956
Estate may be adjudged, subject to qualification, ...	<i>ib.</i>
Adjudication of liferent right, ...	<i>ib.</i>
Heir's right may be sold judicially, subject to qualification, ...	<i>ib.</i>
Sale of heir's contingent right of succession, ...	149
Irritant and resolute clauses, ...	957, <i>et seq.</i>
Strict interpretation of, ...	958
Interpretation of words of flexible meaning, ...	960
Registration of entails, ...	962
Petition for warrant to record, ...	963
Who may petition, ...	<i>ib.</i>
Deed of entail must be produced, ...	<i>ib.</i>
Date of registration, ...	964
Unrecorded entail, ...	<i>ib.</i>
Creditors can adjudge for debts contracted before entail recorded, ...	<i>ib.</i>
Effect of feudalizing entail, ...	<i>ib.</i>
Whether institute is heir of investiture or not, ...	<i>ib.</i>
Publication of conditions in Register of Sasines, ...	965
Conditions need not be inserted in general service, ...	<i>ib.</i>
Omission to insert conditions, ...	966
Reference to conditions, ...	<i>ib.</i>
Consent to registration in Register of Entails must also be in- serted or referred to, ...	<i>ib.</i>
Liability for entailer's debts, and interest thereof, ...	966, 335
Payment by heir of entail, ...	967
Assignment to heir paying out of his own funds, ...	286, 287
How brought to an end, ...	967, <i>et seq.</i>
Prescription, ...	967
Years of minority of heir in possession deducted when prescrip- tion running against entail, ...	658
Second entail, ...	968
Heirs of entail exhausted, ...	<i>ib.</i>
Destination to heirs whomsoever, ...	<i>ib.</i>
Exclusion of heirs-portioners, ...	<i>ib.</i>
Succession of heirs-portioners puts an end to entail, ...	<i>ib.</i>
See <i>Disentail.</i>	
Consequences of contravention, ...	973
Effect of death of contravener, ...	<i>ib.</i>
Declarator of irritancy may be raised by any heir, ...	<i>ib.</i>

INDEX.

1163

ENTAILS—continued.

PAGE

Deeds of contravention not null as regards third parties, . . .	974
Heir of entail not barred by receipt of rents from reducing lease granted by preceding heir in contravention of entail, . . .	181
Heir of entail may be bound to collate, . . .	862
Resignation of property <i>ad remanentiam</i> where superiority entailed, . . .	724
Property fee can be re-issued, . . .	<i>ib.</i>
Extinction or re-issue of real burden on entailed estate, . . .	725
Forfeiture or relinquishment of superiority,—when superiority entailed—when sub-fee entailed, . . .	784, 735
Search in Register of Entails, . . .	666
Adjudication in implement by next heir of entail, . . .	765
Judicial sale of bankrupt's life interest in entailed lands, . . .	956
TRUST-DEEDS CONNECTED WITH ENTAILS, . . .	974, <i>et seq.</i>
(1.) Where entail already executed, . . .	974
Title under trust-deed and under entail not feudally inconsistent, . . .	975
Purposes of trust, . . .	<i>ib.</i>
Powers of trustees, . . .	976
(2.) Trusts of lands to be entailed, . . .	<i>ib.</i>
Directions to make entail, . . .	977
Order to invest money for behoof of series of heirs incompetent, . . .	978
Money invested in trust for purchase of lands to be entailed may be acquired in fee-simple, . . .	<i>ib.</i>
Date of trust-deed held as date of entail, . . .	978, 979
Limited endurance of trust-rights, . . .	988
Power to grant provisions to wives, husbands, and children, . . .	979, 980
Aberdeen Act does not apply to new entails, unless expressly declared applicable, . . .	980
See <i>Marriage-Contract</i> .	
Power to sell land, . . .	981
To exchang, . . .	<i>ib.</i>
To grant feus and long leases, . . .	983, 984
Commission to consent to feuing executed by party domiciled abroad, . . .	85
Lease by heir of entail of which possession had not commenced at his death, . . .	1114
Montgomery Act improvements, . . .	985, <i>et seq.</i>
See <i>Improvements</i> .	
Power to make roads, . . .	988
Heir in possession need not be infeft in order to avail himself of Entail Amendment Act, . . .	<i>ib.</i>
Thelusson Act, . . .	989
Destination to heirs in separate deed, . . .	<i>ib.</i>
Alteration of destination, . . .	<i>ib.</i>
Separate deed may be recorded in Register of Sasines along with principal deed under Titles Act, . . .	<i>ib.</i>
Service under entail, . . .	1016

ENTAILS—continued.

Special service to lands acquired by excambion should refer to destination and conditions, ...	1018
Birth of nearer heir after service, ...	1024, 1025
Security by heir of entail, ...	1082
By heir-apparent, ...	1083
Relief or composition due on entry of heir of entail, ...	1053
Reservation of superior's claim, ...	1054
Obligation binding entailed estate only is not 'a bond' under Rutherford Act, ...	234
Deeds of consent under Rutherford Act irrevocable, ...	970
Grantor's place of abode must be specified in deed of consent, ...	200

ENTRY WITH SUPERIOR—

Superior's title, ...	1051, 1052
May be validated by accretion, ...	1051
Entry from heirs-portioners, ...	<i>ib.</i>
From liferenter, ...	1052
Entry from one not true superior inept, ...	<i>ib.</i>
<i>Ex facie</i> title to superiority, ...	<i>ib.</i>
Vassal cannot object to superior's title which he has recognised, ...	<i>ib.</i>
ENTRY-MONEY, payment of, at stated intervals, ...	581, 592, 593
On change of ownership, ...	581
Duplicand on entry of heir, ...	592
Taxed entry, ...	<i>ib.</i>
In blench holdings, ...	593
Enfranchisement of tailzied investiture, ...	1053
Superior's reservation of claim against heir of tailzie who shall not also be heir of former investiture, ...	1054
If heir obtains assignable charter, ...	<i>ib.</i>
Superior not bound to grant assignable charter to heir on payment of relief, ...	<i>ib.</i>
Superior cannot cause his own agent to register original charter, ...	1055
Superior bound to enter heir though last vassal has conveyed to trustees, ...	<i>ib.</i>
If trustees enter, they are liable in composition, ...	<i>ib.</i>
Superior may require heir to serve, ...	<i>ib.</i>
Unless he has called him in action of non-entry, ...	<i>ib.</i>
Entry of corporation, ...	1056
Of trustees, ...	<i>ib.</i>
Mode of enforcing entry of vassal's disponees within limited time, ...	580
Entry in burgage lands, ...	737, <i>et seq.</i>
See <i>Confirmation by Superior—Resignation—Clare Constat—Superior and Vassal—Relief—Composition.</i>	

ENTRY, TERM OF—

In feu-charter, ...	589
In disposition, ...	635

EQUIVALENTS TO INTIMATION OF ASSIGNATION—

Action raised and executed by assignee against debtor, ...	301
Production of assignation in multiplepounding raised by debtor, ...	<i>ib.</i>

	PAGE
EQUIVALENTS TO INTIMATION OF ASSIGNATION—<i>continued</i>.	
Execution of inhibition founded on debt assigned when sufficient,	301
Verbal communings between assignee and debtor, . . .	302
Debtor's private knowledge will not give assignee preference over subsequent arrestment or intimated assignation, . . .	<i>ib.</i>
Debtor's subscription as witness to deed not equivalent, . . .	<i>ib.</i>
Subscription as party equivalent, ...	<i>ib.</i>
Payment of interest to assignee proves intimation, . . .	<i>ib.</i>
Intimation to debtor's factor insufficient, ...	<i>ib.</i>
Letter by assignee to debtor with answer craving delay sufficient,	303
Letters between agents, ...	<i>ib.</i>
Question whether intimation to agent of debtor abroad sufficient,	<i>ib.</i>
Letter to debtor insufficient, ...	<i>ib.</i>
Presentment of creditor's bill for acceptance by debtor operates assignation and intimation in favour of payee, . . .	304
Reading assignation of share and voting at meeting of shareholders equivalent to intimation to shareholders, . . .	<i>ib.</i>
Registration of sasine equivalent to intimation of assignation of personal right, ...	304, 717
EQUIVALENTS TO DELIVERY, ...	104, 105

ERASURES.See *Vitiations*.**ERROR—**

Operation of, in reference to the execution of deeds, . . .	156
In order to authorize reduction, must be <i>in substantialibus</i> , . . .	<i>ib.</i>
Error in law, ...	<i>ib.</i>
As to legal rights of grantor of discharge, ...	<i>ib.</i>
In fact, ...	157
As to subjects sold, ...	652, 678
In completing title by resignation in place of confirmation, . . .	693, <i>et seq.</i>
In notarial instrument, correction of, ...	742
In entail cannot be corrected after entail comes into operation,	961

ESCHEAT—

Single escheat, ...	239, 507
Liferent escheat, ...	507, 585

EVICITION—

Effect of warrandice in case of, ...	205
Expense of defence against, ...	207
Intimation of threatened eviction to party liable in recourse,	<i>ib.</i>

See *Warrandice*.**EVIDENCE—**

Recent Acts for amending law of, do not refer to instrumentary witnesses, ...	48
Deeds not admissible in evidence until stamped, ...	188
Except in criminal proceedings, or as evidence of a fact, . . .	198
Question as to promissory-note not duly stamped, offered as part evidence of loan transaction, ...	<i>ib.</i>

	PAGE
EXCAMBION—	
Real warrandice rights affecting lands exchanged, . . .	668
Under Montgomery and subsequent Acts, . . .	982
Special service to lands acquired by, . . .	1018
EXCEPTIO NON NUMERATÆ PECUNIÆ—	
History of, . . .	233
Not available to granter of bond after delivery, . . .	<i>ib.</i>
EXCHEQUER COURT ACT—	
Provisions as to personal diligence, . . .	511
Bonds in favour of Crown may be registered without clause of registration, . . .	<i>ib.</i>
Warrant of decree in favour of Crown, . . .	<i>ib.</i>
Six days' <i>inducia</i> of charge, . . .	512
Decrees contain warrant to poind, . . .	513
<i>See Poinding—Arrestment.</i>	
EXECUTION FOR DEBT.	
<i>See Personal Diligence Act—Registration for Execution.</i>	
EXECUTION OF CHARGE. See Personal Diligence Act.	
EXECUTOR—	
Nomination of, by testament, . . .	863
Old law as to rights of executors-nominate, . . .	<i>ib.</i>
Right of executor to third of dead's part excluded by general disposition, . . .	<i>ib.</i>
And now abolished, . . .	864
Universal legatory, . . .	<i>ib.</i>
Where no executor named, or executor declines to accept, . . .	865
<i>Sine quo non</i> , . . .	<i>ib.</i>
Liabilities of, . . .	1045
Primarily liable for personal debts in questions with heir, . . .	237
With creditors, executor and heir are as principal and cautioner, . . .	238
Heir may be sued without calling executor, . . .	<i>ib.</i>
Executor-nominate,—dative. <i>See Confirmation of Executors.</i>	
<i>Ad non executa</i> , . . .	1045
Appointed only where estate not reduced into possession by original executor, . . .	1046
Confirmation of, <i>qua factor</i> , . . .	1141
Signing as witness to testament, . . .	48
Seclusion of, in personal bond, . . .	240
Transfer of shares in joint-stock company by executors of deceased member, . . .	399
<i>See Heritable and Moveable.</i>	
EXECUTOR-CREDITOR, . . .	522, 1046
Confirmation of, may be partial, . . .	1046
Procedure for appointment of, . . .	<i>ib.</i>
Conjoined petitions, . . .	1047
<i>Pari passu</i> ranking of claims, . . .	<i>ib.</i>
Debt must be constituted, . . .	<i>ib.</i>

INDEX.

1167

PAGE

EXECUTOR-CREDITOR—*continued.*

Where heir renounces, decree <i>cognitionis causæ</i> , ...	1047
Where debt due by deceased's heir, procurator-fiscal may confirm, ...	1048
Creditors of deceased preferred to creditors of heir, ...	<i>ib.</i>
Effect of several confirmations applicable to same subject, ...	<i>ib.</i>

EXTENT—

New extent, ...	582
Writ of extent, ...	512

EXTINCTION OF OBLIGATIONS—

Of personal obligations by fulfilment, compensation, confusion, novation, consent, prescription, and liberation of obligants, 320, <i>et seq.</i>	
Of heritable securities, ...	1090

EXTRACT—

Authentication of extract-decrees of Court, ...	93, 94
Of extract deed, ...	217
Equally probative with principal, ...	211
Except in cases of improbation, ...	<i>ib.</i>
Old form of, ...	212
Modern form, ...	214
Improbative if deed recorded in wrong register, ...	216
Extract from Great Seal Register, ...	<i>ib.</i>
Is extract <i>sasine</i> sufficient to found prescriptive title?	657
Proving the tenor of <i>sasine</i> preferable to extract, ...	<i>ib.</i>

FACTOR—

For trustees, ...	892
Power to appoint trustee factor implies power to give remuneration for trouble, ...	893
Trustees' liability for, ...	896
Confirmation of executor <i>qua</i> factor, ...	1041
Arrestment in hands of, ...	521
Factor must accumulate interest on accounts annually, ...	246
Entitled to retain sum due by him on heritable bond till relieved of warrandice for constituent, ...	<i>ib.</i>
Payment to, ...	331
Cannot enter into submission without express power, ...	350
Intimation of assignation to debtor's factor, ...	302

See *Factory*.

FACTOR LOCO TUTORIS—

Appointed by Court, ...	108
Powers of, ...	110
Applications for special powers, ...	111, 116
Remuneration, ...	113
Can enter into submissions of proper questions, ...	351
Office falls on convalescence or death of ward, ...	122
Bound to communicate benefit obtained from ward's estate, ...	149
Not entitled to profit by agency in managing ward's affairs, ...	154

	PAGE
FACTOR LOCO TUTORIS — <i>continued.</i>	
Septennial limitation inapplicable to bond of caution for,	263
Factors <i>loco tutoris</i> and <i>loco absentis</i> subject to Pupils' Protection Act,	246
FACTOR, JUDICIAL.	See <i>Judicial Factor.</i>
FACTORY—	
Who may grant,	418
Distinctions between 'factory,' 'commission,' and 'power of attorney,'	<i>ib.</i>
General and special factory,	<i>ib.</i>
Clauses,	419
Granter may recall,	419, 423
To two or more persons, gives joint power,	419
Quorum,	<i>ib.</i>
<i>Sine quo non</i> ,	420
Usual words of general factory,	<i>ib.</i>
Special powers,	<i>ib.</i>
Can verbal authority to contract for a feu be proved by parole?	<i>ib.</i>
Clause of registration should include deeds to be granted in exercise of power to borrow,	421
Delegation to sub-factor,	<i>ib.</i>
Liability of principal for sub-factor,	422
Transactions should be <i>factorio nomine</i> ,	<i>ib.</i>
Termination of,	423
Does not divest constituent,	<i>ib.</i>
Bankruptcy, incapacity, or death of constituent,	424
Resignation, incapacity, death, or bankruptcy of factor,	<i>ib.</i>
Remuneration of factor,	425
Liability of factor,	<i>ib.</i>
Varies according as he is remunerated or not,	<i>ib.</i>
Exemption from liability,	<i>ib.</i>
Clause of indemnity to parties dealing with factor,	426
Factor cannot obtain power to purchase in claims against constituent,	150
	See <i>Factor.</i>
FEAR.	See <i>Force and Fear.</i>
FEE AND LIFERENT—	
In conjunct rights to husband and wife,	777
To parent and child,	780
To strangers,	785
Legacy to parent in liferent and children in fee,	923
Fee cannot be <i>in pendente</i> ,	783
Fiduciary fee,	784, 786, 824
	See <i>Service—Institute.</i>
Division of expenses of management of trust for liferenter and fiar,	882
Fee-simple,	991

INDEX.

1169

FEMALE—

PAGE

Destination to heirs-female, ...	995
'Heir-female' not synonymous with 'daughter,'	996

FERRY—

Right of, <i>inter regalia minora</i> , ...	569
Symbols of infestment in, ...	611

FEU—

Originally liable to be recalled by superior at pleasure, ...	533
Granted for vassal's lifetime, ...	<i>ib.</i>
Afterwards devolving on vassal's heirs, ...	534
Tenure of feu-farm, ...	534, 544
Vassal cannot refute, ...	591
Within burgh, ...	737
Entry of heirs to feus within burgh, ...	1031
Power to feu entailed lands, ...	983
Security over feuing ground, ...	1083
Verbal agreement to feu validated by <i>rei interventus</i> , ...	185-187
Feu-charter—Feu-disposition, clauses of, ...	544, <i>et seq.</i>
See <i>Charter—Conditions.</i>	

<i>FEUDA NOVA—FEUDA ANTIQUA</i> , ...	992
---	-----

FEUDAL SYSTEM—

Establishment in Scotland, ...	526, <i>et seq.</i>
All land-rights flow from Sovereign, as superior, ...	527
Condition of military service, ...	<i>ib.</i>
Allodial rights supplanted by, ...	531
Distinctive features of, ...	532
Gradual development of, ...	533
Superior's right to refuse consent to entry of purchaser, ...	535
Superiors ordained to receive appraisers in 1469, ...	536
Adjudication took the place of appraising, ...	537
Superiors ordained to enter ordinary purchasers in 1747, ...	<i>ib.</i>
But only by resignation, ...	538
Superiors now bound to enter any person having formal title from last vassal, ...	<i>ib.</i>
Personal services, ...	<i>ib.</i>
Heritable jurisdictions, ...	<i>ib.</i>
Constitution of original feudal estate, ...	541, <i>et seq.</i>
Proper investiture,— <i>breve testatum</i> , ...	541
Improper investiture, ...	542
Charter with separate precept of sasine, ...	<i>ib.</i>
Charter and precept combined, ...	<i>ib.</i>
Symbolical delivery on ground of lands, attested by instrument of sasine, ...	<i>ib.</i>
Registration of instrument for publication made necessary in 1617, ...	<i>ib.</i>
Symbolical delivery unnecessary since 1845, ...	543
Instrument of sasine unnecessary since 1858, ...	<i>ib.</i>

	PAGE
FEUDAL SYSTEM—continued.	
Registration of charter with warrant of registration, ...	543
Voluntary transmission of feudal estate, ...	633, <i>et seq.</i>
FEU-DUTY—	
<i>Debitum fundi</i> , ...	591
Vassal personally liable for, until new vassal entered, ...	<i>ib.</i>
Where vassal grants separate personal bond for, ...	<i>ib.</i>
Superior's claim for payment of, ...	<i>ib.</i>
Does not bear interest by law, ...	<i>ib.</i>
Interest runs from date of demand, ...	<i>ib.</i>
Arrears not claimable by superior after decree of declarator of irritancy <i>ob non solutum canonem</i> , ...	585
Delivery of charter by progress implies discharge of bygone feu- duties, ...	688
Seller not bound to clear lands of feu-duty, ...	667
Division of <i>cumulo</i> feu-duty between lands and teinds, ...	598
Security over feu-duties ought to convey 'the lands,'	1069
FIAR. See <i>Fee and Liferent</i> .	
FIDUCIARY FEE, ...	784, 786, 824
'FIRM'—	
Distinguished from 'company,'	373
Charge at instance of, or against company, ...	501, 503
Company cannot be registered under firm identical with another company, ...	375
Circumstances in which partner of dissolved company held not entitled to use old firm for new establishment, ...	<i>ib.</i>
See <i>Newspaper</i> .	
FISHINGS. See <i>Salmon Fishings—Trout Fishings</i> .	
FISK—	
Its meaning, ...	239
FORCE AND FEAR—	
As the ground of setting aside a deed, ...	175
What is required in order to infer reduction, ...	<i>ib.</i>
Husband and wife, ...	<i>ib.</i>
Ratification by wife, ...	176
Debtor and creditor, ...	<i>ib.</i>
Plea available against onerous third parties, ...	177
FOREHAND RENTS, ...	594, 597
FOREIGN DEEDS—	
Privileges of, as regards authentication, ...	83, <i>et seq.</i>
Deeds by foreigners executed according to laws of domicile, ...	83
By Scotchmen executed out of Scotland according to laws of place of execution, ...	<i>ib.</i>
Conveyance of Scotch heritage, ...	84
Commission by foreigner to convey lands, ...	85
Commission to consent to feuing entailed lands, ...	<i>ib.</i>
Wills applicable to personal estate, ...	<i>ib.</i>

FOREIGN DEEDS—*continued*.

Provisions of Act of 1861 as to authentication of wills, ...	85, 86
Testament executed abroad will not carry Scotch heritage, ...	866
Revocation of settlement by foreign deed, ...	898
Directions to trustees for disposal of lands can be given by will, ...	87
Question as to authenticity of foreign private deed, how settled, ...	<i>ib.</i>
Proof of authenticity of foreign official documents, ...	<i>ib.</i>
Conveyance of foreign heritage, ...	874
Personal obligations construed by <i>lex loci contractus</i> , ...	88
Questions of law arising as to foreign deeds, ...	<i>ib.</i>
Septennial limitation inapplicable to bond of caution executed abroad, ...	263
Validated by <i>rei interventus</i> , ...	184
Personal obligation by Englishman under seal, as compared with one not under seal, ...	185
Obligations by Englishman in favour of Scotchman, ...	<i>ib.</i>

FOREIGN BILLS—

Drawn in sets, ...	481
<i>See Bills of Exchange.</i>	

FORESTS—

<i>Inter regalia</i> , ...	569
----------------------------------	-----

FOUR FORMS, LETTERS OF, ...

494

FRAUD—

In reference to execution of deeds, ...	159, <i>et seq.</i>
Inadequacy of consideration, ...	160
Collusion, cases of, ...	161
Concealment and misrepresentation, ...	162
Not necessarily intentional, ...	163
Circumvention, ...	164
Effect of, in questions with wrongdoer and with third parties, ...	165
Assignations to debts, ...	166
Bonds of York Buildings Company, ...	167
Stock of joint-stock company subject to latent trust, ...	<i>ib.</i>

STATUTES STRIKING AT DEEDS BY DEBTORS IN DEFRAUD OF

CREDITORS, ...	167, <i>et seq.</i>
1621, cap. 18, as to alienations to conjunct or confident persons, ...	167
Cautionary obligations not struck at, ...	168
Provisions to wives and children, ...	168, 169
Gratuitous deeds, ...	169
Date at which solvency of granter ascertained, ...	<i>ib.</i>
1696, cap. 5, as to preferences among creditors, ...	<i>ib.</i>
Indorsation of bills struck at, ...	170
Distinction as to promissory-notes, ...	<i>ib.</i>
Security to cautioner, ...	<i>ib.</i>
Obligation to grant security, ...	171
Completion of debtor's title after bankruptcy to validate prior security, ...	172
Future debts,—cash credits, ...	<i>ib.</i>

	PAGE
FRAUD—continued.	
Date of deed, in regard to latent preferences, ...	173
<i>Jus mariti</i> , ...	<i>ib.</i>
Attempted preferences in sequestrations, ...	173-175
See <i>Bankruptcy</i> .	
Presumption or suspicion of, in reference to vitiations in deeds, ...	69
FREEHOLDER—	
Title to enrolment, ...	702
FRIENDLY SOCIETIES—	
Statutory provisions for settling disputes by arbitration, ...	353
FURTHCOMING—	
Not necessary at instance of Crown, ...	524
Grounds of debt and arrestment must be produced, ...	<i>ib.</i>
Arrestee may object to validity of the diligence, ...	525
But not of the arrester's debt, ...	<i>ib.</i>
Decree of, constitutes perfect diligence, ...	<i>ib.</i>
Bankruptcy of debtor within sixty days of arrestment destroys effect of, ...	<i>ib.</i>
Action of, interrupts prescription of arrestment, ...	<i>ib.</i>
Delay in raising action, ...	<i>ib.</i>
FUTURE DEBTS—	
Not arrestable, ...	520
Dispositions in security of, struck at by 1696, cap. 5, ...	172
GAME—	
Reservation of, to landlord in agricultural lease, ...	1104
Lease of game not good against singular successor, ...	1114
GAMING—	
Statutes relating to, ...	146-148
Bonds, bills, and mortgages for gaming debts, ...	<i>ib.</i>
GENERAL—	
Adjudication, ...	1095
Charge, ...	762
Discharge, ...	323, <i>et seq.</i>
Disposition and settlement.	
See <i>Disposition and Settlement</i> .	
Completion of title by general disponent to lands, ...	871, 872
Liabilities of general disponent, ...	872, 873
Bond and disposition in security by general disponent uninfert, ...	1070
Completion of title by general disponent to bond and disposition in security, ...	1088
Service, ...	1004
See <i>Service</i> .	
Legacy, ...	910
GIRTH, ...	509
GOLD—	
Gold and silver mines <i>inter regalia</i> , ...	568, 569

INDEX.

1173

	PAGE
GOODS IN COMMUNION, ...	796
Division of, ...	796, 797
	See <i>Marriage</i> .
GRACE—	
Act of, ...	195
Days of, ...	459
If last day of grace is a Sunday, ...	460
	See <i>Bills of Exchange</i> .
GROUND-ANNUAL—	
Origin of, ...	1064
Resorted to when subfeuing not attainable, ...	<i>ib.</i>
Security may be lost by negative prescription, if not referred to in subsequent titles, ...	1065
Contract of, ...	1066
Liability of seller personally for burden, ...	1067
Passes by general service, ...	<i>ib.</i>
Stamp-duty, ...	<i>ib.</i>
GROUND, POINDING OF. See <i>Poinding the Ground</i> .	
GUARANTEE—	
Limitation of liability of joint-stock company by, ...	393
GUARANTEE, LETTER OF—	
Provision for changes in company by or to whom granted, ...	258
Obligants have privilege of suretyship, ...	341
GUARDIAN. See <i>Tutor—Curator</i> .	
<i>HÆREDITAS JACENS—</i>	
	See <i>Adjudication in Implement</i> .
Mode of attaching by executor-creditor, ...	1047
HEIR—	
Flexible term—in personal bond means ‘next of kin,’	240
In charter means ‘heirs in heritage,’	550
Crown is <i>ultima hæres</i> on failure of heirs, ...	<i>ib.</i>
Precept of sasine to the heirs of A., ...	603
Mere nomination of heir does not carry heritage, ...	866
Exclusion of heir, how accomplished, ...	866, 998
Heir at law may pass over disposition in his favour, ...	871
Right of succession of heirs of beneficiary, ...	889
Different classes of heirs—meaning of terms, ...	991-998
‘HEIR OF LINE,’ ‘heir at law,’ ‘heir general,’ ‘heir whomsoever,’—	
nearly synonymous terms, ...	235, 991
Leases fall to heir of line, ...	1102
HEIR OF CONQUEST, ...	992
Has place only in collateral succession, ...	<i>ib.</i>
Lands must have been actually acquired by deceased, ...	<i>ib.</i>
Conquest has no place in succession of heirs-portioners, ...	993
HEIRS-PORCIONERS, ...	992
Charter by, ...	1051
Entail by one of several heirs-portioners, ...	943

	PAGE
HEIR—continued.	
Action of division and sale by, ...	774, 775
Succession of, evacuates entail, ...	968, 969
HEIR-MALE GENERAL, ...	236, 993
May be of line or of conquest, ...	993
Service as, carries all rights so destined, ...	1015
HEIR-MALE OF THE BODY, OR OF A MARRIAGE, ...	994
HEIR-FEMALE OF THE BODY, ...	995
'Eldest daughter' or 'heir-female,'	<i>ib.</i>
'Daughter' not synonymous with 'heir-female,'	996
'HEIRS WHATSOEVER' or 'HEIRS AND ASSIGNEES WHATSOEVER,'	<i>ib.</i>
'HEIRS AND SUCCESSORS,' construction of, ...	905
'HEIRS AND BAIENS' in heritage—in moveables, ...	997
Destination to 'bairns'—'children of marriage,'	998
'HEIR OF ENTAIL' does not include 'institute,'	948
Except under Aberdeen Act, ...	802, 951
Distinction between 'heir' and 'institute,'	787
May be bound to collate, ...	862
<i>See Entail.</i>	
HEIR OF MARRIAGE—	
Rights of, ...	819
Discharge by heir of father's obligation in marriage-contract, ...	820
Destination to heirs of marriage, ...	779
<i>See Marriage-Contract.</i>	
HEIR OF PROVISION—	
Service of, ...	1013
HEIR OF TAILZIE AND PROVISION—	
Service of, ...	950, 1016
HEIR-APPARENT—	
Entail provision to wife, husband, or children of, ...	980
Security by, ...	1083
Conveyance <i>inter vivos</i> to, ...	872
<i>See Apparent Heir.</i>	
HEIRS WHOMSOEVER—	
Destination to A. B. and,—is not an entail, ...	939
When succession opens to, entail is at an end, ...	968
And heir of line succeeds, ...	996
COMPLETION OF HEIR'S TITLES—	
Lands held of Crown, ...	998, <i>et seq.</i>
Where ancestor infeft, ...	999
<i>See Service—Chancery Precept.</i>	
Ancestor infeft, but not entered, ...	1008
Ancestor not infeft, ...	1010
Entry by confirmation or resignation, ...	1011
Lands held of subject-superior, ...	<i>ib.</i>
Ancestor entered, ...	<i>ib.</i>
Ancestor infeft, but not entered, ...	1012
Ancestor not infeft, ...	1013

HEIR—*continued.*

Burgage lands, ...	1029, <i>et seq.</i>
Ancestor infeft,—cognition and sasine, ...	1029, 1030
Writ of <i>clare constat</i> ,—special service, ...	1030
Ancestor not infeft,—general service and instrument of resignation and sasine or notarial instrument, ...	1030, 1031
DISCUSSION OF HEIRS.	See <i>Discussion.</i>

HEIRSHIP MOVEABLES, ... 909

HERITABLE AND MOVEABLE—

Personal bonds bearing interest anciently heritable, ...	238
But moveable till term of payment, ...	<i>ib.</i>
Unless term of payment distant or uncertain, ...	239
Obligations with clause of annual-rent, except heritable bonds and bonds secluding executors, now moveable, ...	<i>ib.</i>
Ancient law retained <i>quoad fiscum</i> and rights of husband and wife, ...	<i>ib.</i>
Personal bond payable to 'heirs,' or 'heirs and executors,' de- scends to executors, ...	240
Destination to particular class of heirs excludes executors, ...	<i>ib.</i>
Does will in English form carry personal bond secluding execu- tors?	<i>ib.</i>
Heir's service to bond secluding executors, ...	<i>ib.</i>
Irredeemable annuities affect heirs in heritage primarily, ...	260
Redeemable annuities, ...	<i>ib.</i>
Property of a company heritable, partner's interest moveable, ...	384
Right of succession on part of heirs of beneficiary, ...	389

HERITABLE SECURITIES—

Security by real burden inferior to that by bond and disposition in security, ...	669
Sale of land subject to real burden of existing debts, ...	<i>ib.</i>
Creditor ought to have purchaser's personal obligation, ...	<i>ib.</i>
Real burden by reservation, ...	1061
By constitution, ...	1062
Must be declared to affect the land, ...	<i>ib.</i>
Cannot be constituted by reference, ...	<i>ib.</i>
Reserved burden passes by general service, ...	1063
May be transmitted by assignation, ...	<i>ib.</i>
Assignation of the debt will enable assignee to discharge bur- den, ...	<i>ib.</i>
Discharge of real burden, ...	1064
Preferences among creditors, ...	<i>ib.</i>
Real burdens attached by adjudication, ...	<i>ib.</i>
Real burdens for ground-annuities. See <i>Ground-Annals.</i>	

BOND AND DISPOSITION IN SECURITY, ...	1067, <i>et seq.</i>
Clauses of modern form, ...	1068
Sum to be secured and creditor's name must be specified, ...	<i>ib.</i>
Security for penalty, ...	<i>ib.</i>

	PAGE
HERITABLE SECURITIES— <i>continued.</i>	
Description of lands, ...	1068
Security over superiority and feu-duties ought to convey 'the lands,'	1069
Clause 'with all right, title, and interest,'	<i>ib.</i>
Assignment to rents, ...	<i>ib.</i>
Assignment to writs, ...	1070
Precept for absolute infeftment may be used for infeftment in security, ...	<i>ib.</i>
Where debtor holds general disposition, but has not made up a title, ...	<i>ib.</i>
Clause of warrandice, ...	<i>ib.</i>
Power of redemption, ...	1071
Premonition, ...	<i>ib.</i>
Expenses, how far payable by debtor, ...	<i>ib.</i>
Power of sale, ...	1072
Articles of roup, ...	675, 677
Consignation of price, ...	675, 1072
Creditor selling may not purchase, ...	150, 151, 1073
Is not hindered by ranking and sale at instance of another creditor, ...	772
Creditor not selling may purchase, ...	1073
Advertisements, ...	<i>ib.</i>
Clause of registration, ...	1074
Completion of creditor's right, ...	<i>ib.</i>
Preference by priority of registration, ...	1074, 1077
Registration must be during grantee's lifetime, ...	1074
Death of grantee without registration, ...	<i>ib.</i>
Creditor's remedies in case of non-payment, ...	1075
Creditor preferable to arrester in tenants' hands, ...	<i>ib.</i>
Removal of proprietor in possession, ...	1076
Leases granted by creditor, ...	1077
<i>Pari passu</i> ranking, ...	<i>ib.</i>
Insurance of house property, ...	<i>ib.</i>
Security for prior debts, ...	1078
For future debts—by cash credit, ...	<i>ib.</i>
<i>See Cash Credit.</i>	
Disposition with back-bond, ...	1079
<i>See Back-Bond.</i>	
Arrangements for loan to be made as works progress, ...	1081
Bond of relief and disposition in security, ...	<i>ib.</i>
Bond of annuity,—sale in virtue of, ...	1082
Security by heir of entail, ...	<i>ib.</i>
By heir-apparent, ...	1083
Security over feuing ground ought to reserve power to feu, ...	<i>ib.</i>
Money secured is liable in inventory duty, ...	1038
OLD FORM OF BOND—	
Absolute conveyance followed by sasine, ...	1083, 1084
With <i>a me</i> holding required confirmation by superior, ...	1084
Effect of bond granted with <i>a me</i> holding, by one infeft <i>a me</i> and unconfirmed, ...	<i>ib.</i>

INDEX.

1177

PAGE

HERITABLE SECURITIES—*continued*.

Granting of security by superior, with alternative holding, is not
interjection of superior, ... 701

TRANSMISSION OF SECURITIES—

General conveyance may be so expressed as to carry, ... 870, 871
Assignment, ... 1086
Where part of debt assigned, whole lands disposed in security, ... *ib.*
Assignment of cash-credit bond, ... *ib.*
Stamp-duty, ... 1087
Assignment of security over subjects sold, ... *ib.*
Writ of acknowledgment in favour of heir, ... *ib.*
Whether available in favour of heir of assignee, ... *ib.*
Notarial instrument in favour of general disponee, ... 1088
General disponee *inter vivos*, ... *ib.*
Completion of adjudger's title, ... *ib.*
Of trustee's title, ... 927
Of judicial factor's title, ... 950
Assignment of bond, on which adjudication led, conveys adjudication, ... 1089
Assignee can poind the ground, ... *ib.*

EXTINCTION OF SECURITIES—

In old times by resignation *ad remanentiam* and renunciation, ... 1090
Discharge, ... *ib.*
Restriction of securities, ... *ib.*
Inhibition against creditor, ... *ib.*

See *Inhibition*.

Liability of agent omitting to search records, ... 1085

HERITAGE—

Dispositive words necessary in conveyance of, ... 863
Must be conveyed according to *lex loci rei sitæ*, ... 873
General disposition and settlement applicable to, ... 866
Legacy of, ... 911

HOLDINGS—

Feu and blench, ... 544
Alternative holding, origin and objects of, ... 635-639
Whether struck at by prohibition against subinfeudation, ... 580
Alternative holding now implied when not expressed, ... 635, 641
Holding need not now be specified, ... 635
Except when *de me*, ... 641
Prohibition against alternative holding, ... *ib.*
Distinction between *sasine on a me* and on *a me vel de me* disposition, ... 680, 681
Is seller of lands bound to grant disposition with alternative holding? 653
Alternative holding in disposition of superiority, ... 700
In security over superiority, ... 701
De me holding in annuity or locality right under marriage-contract, ... 816
Alternative holding in destination to heirs of marriage, ... *ib.*
Bond and disposition in security, in old form, with *a me* holding, required confirmation by superior, ... 1084

	PAGE
HOLOGRAPH WRITINGS—	
Privileges of, as regards authentication, ...	73, <i>et seq.</i>
Not necessary that every word should be holograph, ...	73
Writings subscribed by several individuals, holograph of one of them, ...	74
Should bear to be written by granter, ...	75
Burden and mode of proof, ...	<i>ib.</i>
Proof of date, ...	<i>ib.</i>
Acknowledgment of intimation of assignation proves its own date, ...	296
Questions of deathbed, ...	76
Subscription by granter, ...	<i>ib.</i>
Is summary diligence competent on bill holograph of drawer, but not signed by him?	435
Date of holograph deed by women ought to be specified, ...	125
Vitiations in holograph writings. See <i>Vitiations</i> .	
HOMOLOGATION—	
Doctrine of, ...	178
Marriage-contract followed by marriage, ...	178, 850
Marginal addition not duly authenticated, ...	70, 71
Unlawful deed cannot be made good by, ...	179
Adoption of a deed incapable of homologation, ...	180
Wife may discharge legal rights by, ...	812, 813
Ignorance of legal rights, ...	160
Subscription as witness, ...	180-182
Where incompetent, ...	181
Effect of, ...	182
HORNING—	
Letters of, ...	496
Warrant to arrest and poind, ...	<i>ib.</i>
Warrant for letters, ...	497
Messengers' execution formerly indorsed on letters, ...	498
Denunciation of debtor, ...	<i>ib.</i>
Charge in force for year and day, ...	<i>ib.</i>
Register of Hornings, ...	498, 507
Letters of caption, ...	499
Second caption against sheriffs and magistrates, ...	<i>ib.</i>
Old forms now practically superseded, ...	500
Special warrant required for charging edictally, ...	503
<i>Inducie</i> , ...	247
See <i>Personal Diligence Act</i> .	
HUSBAND, RIGHTS OF—	
See <i>Jus Mariti—Right of Administration—Marriage—Marriage-Contract—Married Women</i> .	
Conjunct rights to husband and wife. See <i>Destination</i> .	
HYPOTHEC—	
Cautioner in tack entitled to assignation of, on payment, ...	274
If no assignation granted, arrester may be preferred, ...	<i>ib.</i>
Landlord entitled to reserve for current rents, ...	<i>ib.</i>
Law agent's hypothec, ...	385

INDEX.

1179

PAGE

I. O. U.—

Exempt from stamp-duty, ... 195

IDIOT. See *Incapacitated Persons.*

IMPRISONMENT—

For debt, history of, ... 493, *et seq.*

When competent, ... 509

Sanctuary, ... *ib.*

Deeds extorted from debtors *metu carceris*, ... 176

See *Personal Diligence—Personal Diligence Act.*

Of apprenticeship, ... 348

IMPROBATION. See *Reduction-Improbation.*

IMPROPER INVESTITURE, ... 542

IMPROVEMENTS—

Power to charge entailed estate with, under Montgomery Act, 985-988

Nature of improvements, ... 985

Notice to next heir, ... 986

Account of expenditure, ... *ib.*

By whom signed, ... *ib.*

Declarator, ... 987

Powers under Entail Amendment Act, ... *ib.*

INCAPACITATED PERSONS—

IMPERFECT AGE, ... 107, *et seq.*

See *Pupil—Minor.*

UN SOUNDNESS OF MIND, ... 117, *et seq.*

Cognoscing in cases of insanity or idiocy, ... 117

Appointment of guardian by Court without cognoscing, ... *ib.*

Deeds on behalf of ward granted by tutor or judicial factor, ... *ib.*

Deeds granted subsequent to date when incapacity commenced, ... *ib.*

Summary application to Court, ... 118

Reduction of deeds on ground of incapacity and lesion, ... 118-120

Separate agents where parties have opposite interests, ... 120

Powers of guardians, ... 120, 121

Guardians subject to Pupils' Protection Act, ... *ib.*

Statutory powers and immunities of guardians, ... 121, 122

Office falls on party's convalescence or death 122

Guardian bound to denude, ... *ib.*

See *Married Women—Deaf and Dumb—Interdiction—Intoxication—*

Outlawry—Aliens.

Sasine in favour of incapacitated person, ... 622

INCOME-TAX—

Deducted from annual payments, ... 145

Exemption of provisions from, how far lawful, ... 804

Not deducted in fixing rental of estate for Aberdeen Act annuity, ... *ib.*

INCUMBRANCES.

See *Searches.*

INDENTURE, CONTRACT OF—

Derivation and application of 'indenture,' 844

Obligations of apprenticeship, cautioner, and master, ... 844, 845

	PAGE
INDENTURE, CONTRACT OF—<i>continued.</i>	
Where with company <i>socio nomine</i> , apprentice bound to remaining partner after others have retired, ...	345
Authentication, ...	<i>ib.</i>
Notarial execution where party cannot write, ...	<i>ib.</i>
Informal contract may be validated by homologation or <i>rei interventus</i> , ...	<i>ib.</i>
Stamp-duty, ...	<i>ib.</i>
After-stamping, ...	198, 346
Nullity in case of omission to insert amount of apprentice-fee or other consideration, ...	345
Exception as to law apprentices, ...	346
Dissolved by death of either party, ...	347
On apprentice's death master not bound to repay apprentice-fee, ...	<i>ib.</i>
Master's death, bankruptcy, or desertion, ...	<i>ib.</i>
Rights and liabilities of cautioner for apprentice, ...	347, 348
<i>See Apprentice—Minor—Master.</i>	
INDEMNITY—	
Clause of, in trust-deed, ...	893, 894
INDORSATION—	
Of bills and promissory-notes, ...	449
<i>See Bills of Exchange.</i>	
INDUCIÆ—	
In personal bond, ...	247
In action of constitution and adjudication, ought not to be dispensed with, ...	764
In general service, ...	1005
On decree of Court, ...	504
On Court of Exchequer decree, ...	512
INFECTMENT.	<i>See Sasine.</i>
INFORMAL DEEDS—	
Special cases of privilege as regards authentication, ...	78, <i>et seq.</i>
<i>See Privileged Writings—Homologation—Adoption.</i>	
INHIBITION—	
As a burden on lands, ...	664, 671
Purpose of, ...	1092
Warrants of, ...	<i>ib.</i>
Execution and publication of letters, ...	1092, 1093
Registers of Inhibitions, ...	1093
Include burgage as well as feudal subjects, ...	664
Search must go back forty years, ...	666
Interdictions recorded in this Register, ...	<i>ib.</i>
Vitiations, ...	1094
Reaches <i>acquirenda</i> , ...	<i>ib.</i>
Effect of inhibition used before sequestration, ...	754
By heirs of marriage against father, when competent, ...	821, 823
For attaching beneficiary's right under a trust, ...	924
Against creditor in heritable bond, ...	1090

INDEX.

1181

PAGE

INHIBITION—*continued.*

Notarial intimation to debtor, ...	1091
Discharge or recal of, ...	1094, 1095

See *Litigiousity.*

INITIALS—

Subscription of deed by, ...	46
Proof in support of subscription by, ...	<i>ib.</i>
Notarial execution ought to be used in addition, ...	<i>ib.</i>
Bill signed by, ...	438

INLAND BILL—

Definition of, ...	429
--------------------------	-----

See *Bills of Exchange.*

INQUEST, BRIEVE OF, ...	1000
-------------------------------	------

INSANITY.

See *Incapacitated Persons.*

INSOLVENCY.

See *Bankruptcy—Sequestration.*

INSTITUTE—

Meaning of term, ...	786
Distinction between 'institute' and 'heir,'	787
Conditional institute, proper and constructive, ...	787, 789
Necessity of service distinguishes institute from substitute, ...	790
Substitutions in bonds of provision, ...	858
Institute and substitute legatee, ...	922, 923
In entails, ...	948-951
'Heir of entail' does not include 'institute,'	948
Except under Aberdeen Act, ...	802, 951
The first fiar is institute, ...	949
Even though liferenter intervene, ...	949, 1019, 1020
Infetment of institute exhausts precept, ...	1024

See *Service.*

INSTRUCTIONS—

To prepare settlement, effect of, ...	905
To make entail, ...	977
Verbal instructions to make a will do not constitute a nuncupative testament, ...	78

INSTRUMENT—

Of sasine.	See <i>Sasine.</i>
Of registration and sasine, ...	739
Of disentail, ...	970
Of protest of bill, ...	466, 467
Notarial.	See <i>Notarial Instrument.</i>

INSURANCE—

Of houses on feu, ...	575
When security over house property, ...	1077
Farm houses, ...	1106

INTENTION—

Proved by oath of parties, effect of, on written obligation, ...	249
Expression of, sufficient to convey moveables, ...	862
But not heritage, ...	548

	PAGE
INTERDICTION—	
Voluntary or judicial, ...	131
Bond of, ...	<i>ib.</i>
Publication and registration, ...	131, 666
Operation of, confined to deeds affecting heritable estate, ...	131
Interdicted person can grant personal bonds, ...	132
And onerous and rational deeds affecting heritage, ...	<i>ib.</i>
<i>Mortis causa</i> deeds, ...	132, 904
Has no retrospective effect, ...	132
Deeds by interdicted person, with consent of interdictors, valid, ...	<i>ib.</i>
No right of restitution against such deeds, ...	<i>ib.</i>
Liabilities of interdictors, ...	<i>ib.</i>
Purchase by interdictor of claims against party interdicted, ...	150
Termination of, ...	133
INTEREST—	
‘Legal interest’ stipulated for while usury laws subsisted, ...	148, 242
Rate now arbitrary, ...	<i>ib.</i>
In bonds to private lenders, ...	242, 251
In bonds to banks, etc., ...	243, 253
Anciently uplifted once a year, ...	243
Now payable half-yearly, ...	<i>ib.</i>
On personal bond, runs <i>de die in diem</i> , ...	247
Is due to day of payment, ...	<i>ib.</i>
Obligation for interest may result in obligation for principal, ...	251
Does not run on feu-duties until judicial demand made for pay- ment, ...	591
Usually stipulated for in feu-rights, ...	<i>ib.</i>
On price of lands sold, runs <i>ex lege</i> , ...	673
On legacy, ...	917
On singular successor’s composition, ...	1059
Arrestment of interest of heritable debt, ...	520
COMPOUND INTEREST—	
Overdue interest generally bears no interest, ...	243
When demanded in action at law, interest runs from date of cita- tion, ...	<i>ib.</i>
When expired charge for debt and interest registered in Register of Hornings, accumulation bears interest, ...	244, 267, 506
Denunciation of debtor, ...	244
Suspension of threatened charge, ...	<i>ib.</i>
In adjudication for debt, principal interest and expenses accu- mulated bear interest, ...	<i>ib.</i>
Ranking and sale by creditors or apparent heir, ...	<i>ib.</i>
Stipulation for periodical accumulation unlawful, ...	245
Not claimable under ordinary bond or bill, ...	<i>ib.</i>
In bank accounts, interest annually accumulated into principal sum, bearing interest, ...	<i>ib.</i>
Factors, tutors, and curators bound to accumulate annually, ...	246
Claim for compound interest may be made real by pointing the ground, ...	1096

INDEX.

1183

INTEREST, OBJECTION OF—

PAGE

To notary signing for party, ...	48
Notary giving sasine, ...	608
Notary protesting bill, ...	467
Arbiter's interest in subject of submission, ...	352

INTERJECTION OF SUPERIORS, ...

700

Superior may grant real securities with alternative holdings, ...	701
---	-----

INTERLINEATIONS, ...

66

See *Vitiations*.

INTERLOCUTOR—

Authentication of, ...	93
Provisions of Acts of 1686 and 1693 as to authentication, ...	<i>ib.</i>
Act of 1686 does not apply to deliverances of Presbyteries, ...	<i>ib.</i>
By whom written, ...	<i>ib.</i>
Vitiations, ...	94
Official Acts and decrees of Court, ...	<i>ib.</i>
Provisions of Personal Diligence Act, and relative Act of Sederunt, ...	<i>ib.</i>

INTERRUPTION OF PRESCRIPTION.

See *Prescription*.

INTESTATE SUCCESSION—

Division of goods in communion, ...	796, 797
Heritage falls to heir-at-law, ...	799
Among collaterals and ascendants, ...	860, <i>et seq.</i>
Where part of a succession turns out to be intestate, succession held to have opened as at death of testator, ...	888
Judicial factor on estate of intestate, ...	908

INTIMATION OF ASSIGNATION—

Necessary to divest cedent, ...	291
Equivalent to delivery or possession, ...	104, 292
After intimation, attachment by cedent's creditors, or second assignation, ineffectual, ...	293
Debtor discharged by payment to cedent before intimation, ...	<i>ib.</i>
Set-off not pleadable on unintimated assignation, ...	<i>ib.</i>
Assignment first intimated preferred, ...	<i>ib.</i>
Unintimated assignation preferable to right of cedent's executor, ...	<i>ib.</i>
But not to right of executor-creditor, ...	294
Debtor paying to cedent after intimation liable in second payment, ...	<i>ib.</i>
Act and warrant of trustee in sequestration equivalent to intimated assignation, ...	294, 306
Old and new forms of, ...	295, 296
Debt due by several debtors, ...	297
Intimation to principal is sufficient intimation to cautioners, ...	<i>ib.</i>
To cautioner only insufficient, ...	298
Where debtor a married woman, ...	<i>ib.</i>
Or furth of Scotland, ...	<i>ib.</i>
Or pupil or minor, ...	<i>ib.</i>
Edictal intimation made notarially, ...	299

	PAGE
INTIMATION OF ASSIGNATION—<i>continued.</i>	
To corporation, etc., ...	299
To debtor's agent, ...	302
To trading companies, ...	300
Competitions between assignees, ...	<i>ib.</i>
Not necessary in England, ...	303
Nor where assignee is the person to whom intimation would have to be made, ...	304-306
Other cases where intimation unnecessary, ...	305, 306
Assignment arising by marriage, ...	306
Unintimated assignment granted before marriage preferable to husband's creditors, ...	<i>ib.</i>
Assignment of rents or stipend, ...	317
<i>See Equivalents.</i>	
INTOXICATION—	
Incapacity to contract, arising from, ...	133
INTROMISSION—	
By trustee, what constitutes, ...	896
INVENTORY OF PERSONAL ESTATE, ...	1085
<i>See Confirmation of Executor.</i>	
INVENTORY OF TITLES—	
Relative to disposition, ...	644
INVESTITURE—	
Proper and improper, ...	541, 542
Writ of, ...	735
INVESTMENT—	
Of trust-funds. <i>See Trust-Disposition and Settlement.</i>	
Of company funds, ...	405
IRON SCRIP, ...	229
IRRITANCY—	
Effect of, in feu-charter, ...	574, <i>et seq.</i>
<i>See Conditions.</i>	
Irritant clause in entail. <i>See Entails.</i>	
Declarator of irritancy on contravention, ...	973
IRRITANCY OB NON SOLUTUM CANONEM—	
Peculiar to feu-holdings, ...	584
Enforced by declarator, ...	<i>ib.</i>
May be purged at the bar, ...	585
Superior cannot claim arrears of feu-duty if he enforces this remedy, ...	<i>ib.</i>
JUDGE WARRANT—	
A burden on lands, ...	670
JOINT—	
Joint purchasers for common behoof severally liable for price, ...	248
Joint pursuers severally liable for expenses found due by them, ...	<i>ib.</i>
Deficiency arising from joint obligant's insolvency increases rateable proportions of co-obligant's, ...	249
Equality of interest presumed in joint adventure, ...	379

JOINT—*continued.*

Joint and several liability, ...	247, <i>et seq.</i>
<i>See Personal Bond.</i>	

JOINT-STOCK COMPANIES—

Constitution and object of, ...	388, 389
Provisions of 'Companies Clauses Consolidation Act,'	389
Special Acts, ...	<i>ib.</i>
Where constituted by contract or deed alone, ...	389, 390
Constitution of banks and insurance companies of more than ten and other companies of more than twenty partners, ...	390
Limitation of liability consequent on incorporation not conferred by Acts of modern banks, ...	<i>ib.</i>
Partners of proper company jointly and severally liable for its debts, ...	<i>ib.</i>
<i>See Corporation.</i>	
Register of, ...	391
Registration, when compulsory, ...	<i>ib.</i>
How incorporated under Act of 1862, ...	392
Memorandum of association, ...	<i>ib.</i>
<i>See Limited Liability.</i>	
What changes competent on memorandum of association, ...	393
Articles of association, ...	394
Regulations of Act of 1862 for company limited by shares, ...	<i>ib.</i>
Effect of registration of memorandum or articles of association, ...	395
Registrar's certificates, ...	<i>ib.</i>
Is incorporation under Act of 1862 equivalent to 'Incorporation by Act of Parliament?'	<i>ib.</i>
Liability of members of companies formed under Act of 1862, or registered under Acts of 1856, 1857, or 1858, ...	396, 397
Liabilities of members of other companies unaffected by Act of 1862, ...	397
Limitation by shares or guarantee, ...	<i>ib.</i>
Distinction, as to power of holding land, of companies for gain, and for religious purposes, etc., ...	398
Transfers of shares by executors of deceased member, ...	399
Deeds executed abroad on behalf of company, ...	400
Winding up under Act of 1862, ...	400, <i>et seq.</i>
Judicial winding up, ...	<i>ib.</i>
To what companies does Act apply?	401
Liquidators, ...	402
Registration, when voluntary, ...	403
Transfer of property of company already formed to same com- pany incorporated under Act of 1862, ...	404
Rights of company when incorporated under Act of 1862 as against holders of their property, ...	<i>ib.</i>
Liability of directors paying dividend when companies insolvent, <i>See Directors.</i>	<i>ib.</i>
<i>Delectus personæ</i> as to partners, ...	<i>ib.</i>
Right of pre-emption of shares by company, ...	405

	PAGE
JOINT-STOCK COMPANIES—continued.	
Investment of company funds, ...	405
Descriptive firm may sue in its own name and that of three partners, ...	<i>ib.</i>
Manager may sue when companies constituted by contract, ...	406
Calls, ...	<i>ib.</i>
Arrestment of calls by creditor of company, ...	407
Arrestment by shareholder in hands of company, ...	<i>ib.</i>
Stock held subject to latent trust, ...	167
JOINTURE.	<i>See Marriage-Contract.</i>
JUDGE OF ROUP—	
His duties, ...	674, 675
JUDICIAL FACTOR—	
On estate of a company, ...	382, 384
On trust-estate, ...	907
Under Bankrupt Act, ...	908
Completion of title by, ...	927
Under Titles Act 1858, ...	928
Where title in person of deceased, ...	<i>ib.</i>
Title in trustees, ...	929
Declaratory adjudication, ...	<i>ib.</i>
Title to moveables, ...	930
To heritable securities, ...	<i>ib.</i>
Confirmation of, as executor-dative, ...	1042
JUDICIAL RATIFICATION.	<i>See Ratification.</i>
JUDICIAL SALE.	<i>See Ranking and Sale.</i>
JURISDICTIONS, HERITABLE,	
Abolished in 1747, ...	538
Compensation paid in lieu of, ...	540
Compensation paid in lieu of, ...	<i>ib.</i>
JUS CEDENDARUM ACTIONUM—	
Competent to cautioners, ...	273, 339
JUS CREDITI—	
To children during father's lifetime, ...	882, 834
Created by obligation to convey lands, ...	716
Conveyed by assignation, ...	<i>ib.</i>
Right of legatee after vesting, ...	923
JUS MARITI—	
Husband's right in regard to wife's personal estate, ...	122, 792
Exclusion or renunciation of, ...	124
Wife's power to grant deeds when husband's rights excluded, ...	<i>ib.</i>
Exclusion in marriage-contract, ...	848
In bill of exchange, ...	440
Effect of Statutes striking against fraud, ...	173
How far falling to trustee in sequestration, ...	<i>ib.</i>
	<i>See Marriage.</i>

INDEX.

1187

	PAGE
<i>JUS RELICTÆ</i> , ...	796
Husband cannot affect by testamentary deed, ...	797
Special provision in lieu of terce does not exclude, ...	<i>ib.</i>
Widow bound to elect between <i>jus relictæ</i> and provisions under universal settlement by husband, ...	818
Marriage-contract provisions not deducted, ...	814
Complete without confirmation, ...	1050
JUSTICE OF THE PEACE—	
Ratification of deeds by married women taken before, ...	126, 127
May imprison for debt, ...	509
KENNING TO TERCE, ...	796
KIN, NEXT OF.	See <i>Next of Kin</i> .
LADY'S GOWN, ...	793
LANDS—	
Description of, ...	552, <i>et seq.</i>
General description, ...	552
Description by reference, ...	553
Under Titles to Land Acts, ...	554, <i>et seq.</i>
Power to trustees to purchase 'lands' means property of lands, ...	892
Does not include feu-duties, ...	<i>ib.</i>
LANDLORD AND TENANT.	See <i>Lease</i> .
LATIN LANGUAGE—	
In charters, ...	544
Employed in Crown charters till time of Cromwell, ...	<i>ib.</i>
Again adopted after the Restoration, ...	<i>ib.</i>
Discontinued in 1847, ...	<i>ib.</i>
LAW AGENT—	
Acting for granter and grantee, questions as to delivery of deed, ...	96
See <i>Delivery</i> .	
Separate agents for parties having opposite interests, ...	120, 932
Hypothec, ...	835
Does not innovate account by taking bond or bill, ...	<i>ib.</i>
Intimation of assignation to debtor's agent, ...	302
Superior's agent, ...	576, 581, 1055
As factor, accumulates interest annually, ...	246
Submission by, without express power, may bind himself, ...	350
Liability of, omitting to intimate assignation, ...	294
Omitting to search records, ...	1085
Cannot purchase constituent's estate, ...	149
Purchase of subjects over which client had a security held to have been for client, ...	150
Agreement between agents in Supreme and Inferior Courts for mutual employment, ...	152
Between agents and messengers-at-arms, ...	<i>ib.</i>
Between agents and clients as to professional charges, ...	152, 153

LAW AGENT—*continued*.

Professional charges not allowed to trustee, factor <i>loco tutoris</i> , and curator <i>bonis</i> , ...	154, 893
Nor to trustees, ...	<i>ib.</i>
Unless trustees have power to name one of themselves agent, ...	155, 893
Tutor and curator <i>ad litem</i> entitled to remuneration, ...	155

LEASE—

Real right under, ...	1101
Registration of Leases Act, ...	<i>ib.</i>
AGRICULTURAL LEASE, form of, ...	1102
Implied <i>delectus personæ</i> as regards tenant, ...	<i>ib.</i>
Exclusion of assignees and sub-tenants, ...	<i>ib.</i>
Power to landlord to terminate lease on tenant's bankruptcy, ...	1108
Reservation of minerals, ...	1104
Of game, hares, and rabbits, ...	<i>ib.</i>
Endurance of lease,—term of entry, ...	<i>ib.</i>
Warrantice, ...	206, 1105
Payment of rent, ...	1105
Public burdens, ...	<i>ib.</i>
Repairs, ...	<i>ib.</i>
Extraordinary damage, ...	1106
Insurance of houses, ...	<i>ib.</i>
Obligations as to cropping, etc., ...	1107
Removal of tenant,—warning, ...	<i>ib.</i>
If lease duly stamped, tenant's consent to remove without warning not liable in duty, ...	192
Tacit relocation, ...	1108
Essentials of lease under Act 1449, cap. 18, ...	1118, 1114
(1.) Writing,—verbal lease good for a year, ...	1118
Effect of <i>rei interventus</i> , ...	1114
(2.) Definite ish, ...	<i>ib.</i>
(3.) Rent must not be elusory, ...	<i>ib.</i>
(4.) Possession, ...	<i>ib.</i>
Must be under the lease, ...	<i>ib.</i>
Act applies to urban tenements, ...	<i>ib.</i>
But not to game, ...	<i>ib.</i>
Essentials under Leases Registration Act, ...	1115
Leases not good against singular successors, unless proprietors have real rights, ...	<i>ib.</i>
Lease binding on heirs of grantor, ...	<i>ib.</i>
BUILDING LEASE, ...	1108
Endurance of, ...	<i>ib.</i>
MINERAL LEASE, ...	1109
Short clause of registration competent in, ...	230
Agreement that lease void after referees report work unprofitable binds parties to name referees, ...	354
Assignees and sub-tenants generally not excluded, ...	1109

INDEX.

1189

PAGE

LEASE—continued.

Endurance of, ...	1109
Qualification of warrandice, ...	1110
Fixed rent and lordships, ...	<i>ib.</i>
Leases examined by intending purchaser, ...	597
Exception of, from warrandice in dispositions, ...	600
Clause of submission, ...	354
Endurance of submission, ...	362, 364
Purchaser bound to implement obligations in lease or by local usage, ...	645
Sale before tenant's entry, ...	<i>ib.</i>
Destination cannot be altered by institute, ...	785, 1108
Lease granted on deathbed reducible, ...	1115
By heir of entail, ...	954, 988, 984
By heritable creditor, ...	1077
By liferenter, ...	1115
By tutor, ...	<i>ib.</i>
Not affected by terree, ...	796
Provision of conquest as affecting, ...	809
Entail of, good <i>inter hæredes</i> only, ...	941
Liabilities of heirs and executors of landlord for meliorations, ...	237, 337
Verbal agreement for lease validated by <i>rei interventus</i> , ...	186
Sub-lease, ...	1111
Power to assign implies power to sublet, ...	<i>ib.</i>
Principal tenant remains bound, ...	<i>ib.</i>
Tenant's heir needs no service, ...	<i>ib.</i>
Unless under Leases Registration Act, ...	1111, 1112
Assignment of lease, ...	314, 1112
Ineffectual without possession, ...	306, 1113
Unless within Registration of Leases Act, ...	306, 1112
Liabilities of assignee, ...	336, 1112
Registration of assignation in register of sasines in which lease registered, ...	1112
Intimation to sub-tenant where there is sub-lease, ...	1113
Lease can be adjudged or fall to trustee in sequestration unless prohibited, ...	314
When registered, possession or intimation unnecessary, ...	314, 316
Bond and assignation of registered lease in security, ...	316, 1113
Assignee liable for rent after possession, ...	316
Where sub-tenant in possession intimation to him sufficient, ...	<i>ib.</i>
Agreement as to transferring stock to landlord at end of lease at valuation binds parties to name referees, ...	354
Renunciation of lease, ...	1113

LEGACY—

Universal, ...	909
General, ...	910
Special, ...	<i>ib.</i>
<i>Legatum liberationis—rei alienæ</i> , ...	911

	PAGE
LEGACY—continued.	
Of heritage, ...	911
Revocation of, ...	912
Special legacy not revoked by general disposition and settlement, ...	<i>ib.</i>
Description of legatee, ...	<i>ib.</i>
Of subject conveyed, ...	913
Sum of money in bank, ...	<i>ib.</i>
Double legacies, ...	914
<i>Conditio si sine liberis</i> , ...	914, 921
Effect of forfeiture by repudiating general settlement, ...	915
Verbal, ...	<i>ib.</i>
Incompetent to grant by bill, ...	487
VESTING OF LEGACIES—	
Presumptions as to, and conditions in grants of legacies, ...	916, <i>et seq.</i>
Legacy to one in liferent and another in fee, ...	916
To parent in liferent and children in fee, ...	923
To trustee, ...	916
Interest on legacy, ...	917
Interim payment, ...	<i>ib.</i>
Power of testing on legacy, ...	918
Trustees, ...	919, 920
Legacy lapses by predecease of legatee, ...	920
Unless destined to his heirs, ...	921
Legacy to several parties and survivor, ...	<i>ib.</i>
Substitutions in grants of legacies, ...	791, 922
'Whom failing,' not necessary, ...	922
Special trusts for substitutes, ...	923
Legatee may transmit his right as soon as vested, ...	<i>ib.</i>
Assignment of legacy, ...	810, 811, 921
If not vested, assignment subject to contingency, ...	811
Assignment of expected bequest incompetent, ...	<i>ib.</i>
Arrestment, ...	921
Truster undivested of heritage by trust-disposition for payment of debts, ...	812
Assignment—proper form to acquire <i>jus crediti</i> , ...	<i>ib.</i>
Distinction between legacy to individuals and to a class, ...	922
To A. and B. jointly—to A. and B. equally between them, ...	<i>ib.</i>
Testament sustained where legatees were witnesses, ...	48
Legacy <i>ob turpem causam</i> , ...	187
LEGACY-DUTY—	
Due out of trust-estate directed to be sold, ...	888
Where trustees sell under discretionary power, ...	889
LEGAL—	
Term of reversion, ...	656, 1097
Legal and conventional terms. See <i>Assignment to Rents</i> .	
LEGITIM—	
Parents cannot affect, by testamentary deed, ...	797

INDEX.

1191

LEGITIM—*continued.*

PAGE

Discharge of, during father's lifetime, ...	842
After father's death, ...	<i>ib.</i>
Includes personal bonds, ...	843
Not affected by postnuptial settlement, ...	852
Exclusion of, by special provision, ...	855
Forfeiture of legacy by child claiming legitim, ...	915
Vests without confirmation, ...	1050

LETTERS OF FOUR FORMS, ... 494

LIFERENT AND FEE—

Bond granted to liferenter and fiar must be discharged or assigned by both, ...	251
Money realized to be deposited, ...	<i>ib.</i>
Poining against liferenter, ...	514
Assignment of liferent right to lands, ...	316
Liferent alienary, ...	782, 786, 824, 833
Service under destinations in liferent alienary, ...	1019, 1020
Legacy to one in liferent and another in fee, ...	916
Legacy to parent in liferent and children in fee, ...	923
Liferent right to wife by <i>sasine propriis manibus</i> , ...	616
Division of expenses of management of trust for liferenter and fiar, ...	882
General liferent of estate may not include perishable effects, ...	910
Liferenter under entail, ...	941
Must be in life at date of entail, ...	989
Service under destinations in liferent and fee, ...	1018

See Service.

Liferenter by constitution requires special powers from fiar to enter vassals, ...	1052
Liferenter by reservation can enter vassals, ...	<i>ib.</i>
Leases by liferenter, ...	1115

See Destination—Marriage-Contract—Fee and Liferent.

LIFERENT ESCHEAT, ... 507, 585

LIMITATION, SEPTENNIAL—

Of cautionary obligations under Act of 1695, ...	261
Exceptions from operation of Act, ...	261, 266, 267
Act inapplicable when term of payment beyond seven years, ...	262, 266
Where bond renewed, or corroboration granted, by cautioner, ...	<i>ib.</i>
Cautioner must be bound from date of principal bond, ...	263
Principal bond must be for sum actually due, ...	<i>ib.</i>
Cautioners to whom Act does not apply, ...	263, 264
Expiry of seven years operates entire liberation, ...	265
Can cautioner renounce benefit of Act?	<i>ib.</i>
Cautioner may be barred from benefit, ...	266
Distinction between septennial limitation and prescription, ...	337

See Cautioner—Bond of Caution.

LIMITED LIABILITY—

Of joint-stock company, how effected, ...	393
---	-----

LIMITED LIABILITY—continued.

By shares, ...	393, 397
By guarantee, ...	<i>ib.</i>
Act of 1855 (English), provision of, against loan of company's money to shareholder, ...	405

LINE, HEIR OF, ...	235, 991
--------------------------	----------

*See Heir.***LIQUIDATORS OF JOINT-STOCK COMPANY—**

Where more than one appointed in voluntary winding-up, appointment stands good though one resigns, ...	402
Power of enforcing payment of calls, ...	407
Summary procedure not competent where calls made by directors before liquidators appointed, ...	<i>ib.</i>

LITIGIOSITY—

Created by inhibition and adjudication, ...	671, 672, 1098
Strikes only at voluntary deeds, ...	672
Diligence by creditor of legatee, ...	924
Singular successor becoming heir after action of non-entry is liable in composition to superior, ...	1056

LOCALITY—

Provision to wife in marriage-contract, ...	805, <i>et seq.</i>
To children, ...	826

*See Marriage-Contract.***LOCH—**

As part and pertinent of lands, ...	565
Common property in, ...	<i>ib.</i>
Right to, carries the <i>solum</i> as well as the water, ...	566

LOOSING OF ARRESTMENTS, ...	525
-----------------------------------	-----

LUNATIC.*See Incapacitated Persons.***MAILS AND DUTIES, ACTION OF—**

Gives creditor right to levy rents, ...	769
Creditor's right a burden on landlord's right, ...	1075
When debtor sequestrated, ...	<i>ib.</i>
In virtue of ground-annual right, ...	1067

MARGINAL ADDITIONS—

Authentication of, ...	70, 72
Imperfect authentication followed by homologation, ...	70
When deed executed notariaily, ...	41

MARITIME WRITS—

Contract for building a ship, ...	411
Ships must be registered to entitle to a clearance, ...	<i>ib.</i>
What necessary in order to registration, ...	<i>ib.</i>
Certificate of registry, ...	412
Changes of mastership, ...	<i>ib.</i>
Exemptions from stamp-duty, ...	417
Bond and vendition of ship in security not exempt, ...	<i>ib.</i>

See Ships—Mortgage.

INDEX.

1193

MARK—

PAGE

Deed cannot be signed by, ...	46
Rule does not apply to bills and promissory-notes, ...	<i>ib.</i>
Bill signed by, ...	433, 434
Is acceptance of bill by mark sufficient under Mercantile Law Amendment Act?	434

MARRIAGE—

Legal rights of spouses and children, ...	792
---	-----

RIGHTS OF HUSBAND.

(1.) <i>Jus mariti</i> —	
Carries wife's moveables, ...	<i>ib.</i>
Does not give any right to heritage, ...	<i>ib.</i>
Conjugal Rights Amendment Act, ...	793
(2.) Right of administration, ...	794
(3.) Courtesy, ...	<i>ib.</i>
Husband liable for interest of wife's personal debts, ...	<i>ib.</i>
With recourse against her estate, ...	<i>ib.</i>
Husband's liability for wife's personal debts, ...	<i>ib.</i>
And for interest on heritable debts, ...	<i>ib.</i>
Qualifications of husband's liability, ...	<i>ib.</i>

RIGHTS OF WIFE, ...	<i>ib.</i>
---------------------------	------------

Terce, ...	795
------------------	-----

See *Terce*.

COMMUNION OF GOODS, ...	796
-------------------------------	-----

Division of, where husband survived by wife and children, ...	<i>ib.</i>
Where husband survived by wife but no children, ...	797
Where wife predeceases, ...	<i>ib.</i>
Wife cannot affect by legacy, ...	798
Rights of wife's next-of-kin excluded, ...	<i>ib.</i>
Sum assured on life of spouse not within goods in communion, ...	<i>ib.</i>
<i>Jus relictæ</i> , ...	796
Legitim, ...	797
Dead's part, ...	<i>ib.</i>

Restraints on marriage, ...	137
-----------------------------------	-----

Marriage brokerage contracts, ...	138
---	-----

See *Married Women*.

MARRIAGE, CASUALTY OF—

In wardholdings, ...	530
Single and double avail, ...	<i>ib.</i>
Abolished in 1748, ...	531

MARRIAGE-CONTRACT—

Objects of, ...	799
Stamp-duties, ...	191
Antenuptial contract, ...	799
Contract by minor who has curators ought to be with their consent, ...	<i>ib.</i>

I. PROVISIONS BY HUSBAND.

(1.) In favour of wife—	
Wife's annuity or jointure, ...	800, <i>et seq.</i>

1

2

3

4

5

6

7

8

9

10

11

12

13

14

15

16

17

18

19

20

21

22

23

24

25

26

27

28

29

30

31

32

33

34

35

36

37

38

39

40

41

42

43

44

45

46

47

48

49

50

51

52

53

54

55

56

57

58

59

60

61

62

63

64

65

66

67

68

69

70

71

72

73

74

75

76

77

78

79

80

81

82

83

84

85

86

87

88

89

90

91

92

93

94

95

96

97

98

99

100

MARRIAGE-CONTRACT—*continued.*

2. Provisions to children—	
Where husband has entailed estate, ...	814
Fee-simple estate, ...	<i>ib.</i>
Feudal rules applicable, ...	815
Destination of estate, ...	<i>ib.</i>
Seclusion of heirs-portioners, ...	<i>ib.</i>
Marriage-contract becomes one of the titles of the estate, ...	816
Alternative holding, ...	<i>ib.</i>
Where father is institute and fiar, children only heirs of provision, ...	817
And father can burden for onerous causes or sell, ...	<i>ib.</i>
Not bound to re-invest price, ...	<i>ib.</i>
Children preferable to gratuitous dispoances of father, ...	<i>ib.</i>
Father cannot exclude heir on account of bankruptcy, ...	818
Nor insanity, ...	<i>ib.</i>
Nor can he restrict heir to an annuity, nor affect heir with an entail, unless power to do so reserved, ...	<i>ib.</i>
Nor with a trust, except for father's creditors, ...	<i>ib.</i>
Reserved power to entail, ...	<i>ib.</i>
To grant provisions for children of subsequent marriage, ...	819
Heir of marriage entitled to claim price of land sold as <i>surrogatum</i> , ...	<i>ib.</i>
But not to lands bought with such price, ...	<i>ib.</i>
Heir alone can object to gratuitous deeds by father to his prejudice, ...	820
Father can convey settled estate to heir during his lifetime, ...	<i>ib.</i>
Calling what heirs-substitute he thinks fit, ...	<i>ib.</i>
Heir can then disappoint substitutes gratuitously, ...	<i>ib.</i>
Heir expectant can discharge father's obligation in his favour, though heir predecease father, ...	<i>ib.</i>
Where heirs prohibited from altering destination, ...	<i>ib.</i>
Gratuitous alteration not now prevented by prohibition to alter, ...	<i>ib.</i>
Mode of excluding right of heir-expectant to alter, ...	821
Heir cannot inhibit father from selling or burdening, ...	<i>ib.</i>
Cannot assign his right, unless father conveys to him, ...	<i>ib.</i>
Rights of heir on death of father, ...	<i>ib.</i>
Can raise actions and transmit his <i>jus crediti</i> without service, ...	<i>ib.</i>
Cautioner for fulfilment of father's obligations, ...	<i>ib.</i>
Mode of making children creditors during father's life, ...	822
Marriage-contract the ruling settlement, so long as destination in it is unaltered, ...	823
Form of contract where father divests himself of fee, ...	824
Disposition to trustees,—to father in liferent allenary, and heirs of marriage in fee, ...	<i>ib.</i>
Effect of infetment thereon, ...	<i>ib.</i>
Fiduciary fee for children, ...	<i>ib.</i>
Where father has prior title, ...	<i>ib.</i>
Where he has no prior title, ...	825
First heir under contract is a creditor among heirs, ...	286

MARRIAGE-CONTRACT—*continued.*

Succeeding heirs are heirs of provision and liable for debts as such, ...	236
Provisions to younger children under powers in entail or Aberdeen Act, ...	826, <i>et seq.</i>
'Younger children' includes daughter senior to heir-apparent, ...	827
Provision may be made to vest during father's life, ...	<i>ib.</i>
Trustees for younger children, ...	<i>ib.</i>
Father may annex lawful conditions in granting provisions, ...	<i>ib.</i>
Can he annex conditions in favour of third party?	828
Obligation in favour of daughter and her husband in liferent, and children in fee, held to constitute a trust, and judicial factor appointed, ...	331
Rental of estate, ...	829
Liferent right to surviving husband of heiress of entail excludes provision to younger children, ...	<i>ib.</i>
But an order to accumulate rents for a year does not affect children's claims, ...	<i>ib.</i>
Are children of heir presumptive 'younger children'?	<i>ib.</i>
How heir of entail may be bound to clear off previous provisions, ...	<i>ib.</i>
Guarantee that provisions shall be of specified amount, ...	830
Provisions under powers in entail affect the fee, ...	<i>ib.</i>
Aberdeen Act provisions affect only the rents, ...	<i>ib.</i>
Provisions to younger children out of fee-simple estate, ...	<i>ib.</i>
Presumption that children not creditors, ...	831
<i>Spes successionis</i> , ...	<i>ib.</i>
Mode of making children creditors, ...	832
Provision to father in liferent or liferent allenarly, ...	832, 833
Provision of conquest to children, ...	833
Provision out of wife's jointure, ...	<i>ib.</i>
Security to trustees for payment of provision, ...	834
Gives children <i>jus crediti</i> and preference, ...	<i>ib.</i>
Constitution of trust, ...	835
Purposes of trust, ...	836
Powers of trustees, ...	837
Power of apportionment of provisions, ...	<i>ib.</i>
Arises to father by law, ...	<i>ib.</i>
Power to limit child's interest to a liferent, ...	<i>ib.</i>
Father can delegate his power, ...	838
Division must not be illusory, ...	<i>ib.</i>
Distinction between conferred and reserved power, ...	838, 839
Equal division where power not exercised, ...	839
Posthumous child has equal rights, ...	<i>ib.</i>
Issue of predeceasing child take parent's share, ...	840
Can father apportion among issue of deceased child?	<i>ib.</i>
Power to grant suitable provisions to wife and children of husband's second marriage, ...	<i>ib.</i>
Excessive provisions reducible, ...	<i>ib.</i>
Provisions in full of legal claims, ...	841

MARRIAGE-CONTRACT—*continued.*

Discharge of legitim during father's life, ...	842
After father's death, ...	<i>ib.</i>
Discharge of conventional provision during father's life, ...	843
Antenuptial provisions in competition with creditors, ...	168

II. PROVISIONS BY WIFE.

Settlement of her property upon herself, ...	844
Conveyance to trustees, ...	<i>ib.</i>
Purposes of trust, ...	<i>ib.</i>
Power to maker of trust to name additional trustees, ...	886
Conveyance by wife includes property falling to her during the marriage, ...	846
Small successions reserved to wife, ...	<i>ib.</i>
Terminable annuity belonging to wife, ...	<i>ib.</i>
Provision for wife's outfit, ...	<i>ib.</i>
Power to compromise claims relating to wife's estate, ...	847
In case of wife's second marriage, ...	<i>ib.</i>
Under Aberdeen Act, ...	<i>ib.</i>
Security for wife's provisions out of her own funds, ...	848
Exclusion of <i>jus mariti</i> , ...	<i>ib.</i>
Intimation of wife's assignation unnecessary, ...	<i>ib.</i>
Provision for implement of contract, ...	849
Wife with curator <i>ad litem</i> may sue husband for implement, ...	<i>ib.</i>

Marriage must follow to make contract effectual, ...	<i>ib.</i>
Informal contract validated by homologation, ...	180, 850
Conveyancer ought to see previous contracts in same family, ...	855

See *Postnuptial Marriage Settlement.*

MARRIED WOMEN—

Subscription of deeds by, ...	36, 37
Intimation of assignation to, ...	298
Incapacity of, to grant deeds, ...	122
Husband's rights in regard to wife's estate, ...	<i>ib.</i>

See *Jus Mariti—Right of Administration.*

Nullity of deeds granted without husband's consent, ...	123
Husband's curatorial power draws back to proclamation of banns, ...	<i>ib.</i>
Wife's ratification during marriage of no effect, ...	<i>ib.</i>
Wife's power to grant deeds when husband's rights excluded, ...	124
Wife may bind husband for necessities, ...	<i>ib.</i>
May bind her aliment or separate estate for necessities, ...	<i>ib.</i>
May grant personal obligations, when carrying on trade on her own account, ...	<i>ib.</i>
Provisions of Conjugal Rights Act for protection of property of wife deserted by husband, ...	<i>ib.</i>
Diligence against, ...	125
May dispose of her estate <i>mortis causa</i> without husband's consent, ...	126
May be testamentary trustee, ...	<i>ib.</i>
Judicial ratification of deeds by, ...	123, 126

See *Ratification.*

	PAGE
MARRIED WOMEN—<i>continued.</i>	
Judicial proceedings against or at instance of, ...	128
Husband called as defender, ...	<i>ib.</i>
Exceptions, ...	<i>ib.</i>
Husband's concurrence to suits at instance of wife, where necessary, ...	<i>ib.</i>
Husband cannot dispose of wife's heritage, ...	<i>ib.</i>
Widow can homologate or adopt obligation granted during marriage, ...	129
MASTER—	
Bound to teach apprentice, ...	346
But not always personally, ...	<i>ib.</i>
Cannot substitute another in his place, ...	347
Statutory provisions for settling by arbitration disputes between masters and workmen, ...	353
<i>See Apprentice—Indenture.</i>	
MEMORIAL AND ABSTRACT—	
Of proof in action of ranking and sale, ...	770
MERCHANT SHIPPING ACT. <i>See Ships—Mortgage.</i>	
MESSENGER-AT-ARMS—	
Origin of term, ...	508
Agreement between law-agent and messenger as to remuneration of, ...	152
<i>See Horning—Personal Diligence Act.</i>	
MID-COUPLE, ...	709
MID-IMPEDIMENT, ...	640, 683, 684
MID-SUPERIORITY, ...	640
Interjection of mid-superior, ...	700, 701
MILL—	
Symbols of infetment in, ...	611
Separate act of infetment necessary, ...	615
<i>See Part and Pertinent.</i>	
MINERALS—	
Reservation of, in feu-charter, ...	570-572
In lease, ...	571, 1104
Power to work, ...	571
Are damages due by superior working?	<i>ib.</i>
Superior's title to, ...	572
Mineral lease, ...	1109, <i>et seq.</i>
<i>See Lease.</i>	
MINES—	
Gold and silver, <i>inter regalia</i> , ...	568, 569
MINISTER, PARISH—	
Acts as notary in execution of testaments, ...	89, 43, 904
Privilege belongs exclusively to minister of parish where testator dwells, ...	43

INDEX.

1199

	PAGE
MINOR, ...	107, 108
Affairs of, under charge of curators, ...	108
Curators chosen by minor, ...	<i>ib.</i>
Distinction between legal position of pupils and minors, ...	109
Deeds by minors with or without consent of curators, ...	109, 113
Discharge by minor, ...	329
Provisions by minors to wives and children, ...	113
Deed by minor without curators reducible on ground of lesion, ...	<i>ib.</i>
Contract of marriage by minor having curators ought to be with their consent, ...	799
Cannot enter into indenture without consent of father, if alive, ...	345
Presentation by minor to a church, ...	114
Can make a testament, ...	114, 904
But not a <i>mortis causâ</i> disposition of heritage, ...	114
Mutual contract entered into by minors with other parties, ...	<i>ib.</i>
Judicial proceedings at instance of or against, ...	<i>ib.</i>
Right of restitution for forty years in cases of original nullity, ...	115
Right of restitution during <i>quadriennium utile</i> , ...	<i>ib.</i>
May be confirmed as executor, ...	1041
May be instrumentary witness, ...	47
Arrestment in hands of, ...	523
Intimation of assignation to minor debtor, ...	298, 299
	<i>See Curator.</i>
MINORITY—	
Years of, deducted in reckoning years of prescription, ...	654, 658
Plea of, in reference to prescription of bills, ...	486
MINUTE OF SALE.	<i>See Sale.</i>
MINUTES OF ROUP.	<i>See Articles of Roup.</i>
MINUTE-BOOK, ...	620
MISSIVES OF SALE.	<i>See Sale.</i>
MONTGOMERY ACT—	
Excambion under, ...	982
Improvements under, ...	985-988
MORTGAGE OF SHIP—	
Form of, ...	414
Registration of, ...	<i>ib.</i>
Preference according to date of registration, ...	<i>ib.</i>
Transfer and discharge of, ...	<i>ib.</i>
Transfer on marriage, bankruptcy, and death, ...	415
Certificate of, where required, ...	<i>ib.</i>
MORTIFICATION—	
Investment of funds belonging to, ...	891
MORTMAIN, TENURE OF—	
Abolished at the Reformation, ...	535
MORTUUS SASIT VIVUM, ...	998

	PAGE
MOVEABLES—	
Construction of destinations of, ...	779
Entail of, ...	941
Expression of intention sufficient to convey, ...	862
May be conveyed along with heritage by general disposition and settlement, ...	867
Import of terms of conveyance, ...	867, 868
Corporeal moveables transferred by delivery, ...	281
No security constituted by assignation of, even if followed by instrument of possession, ...	315
Deposit or pledge essential, ...	ib.
Distinction between corporeal and incorporeal, ...	409
Transfer of ships must be by deed, ...	ib.
Transmission Act of 1862 inapplicable, unless subjects contained in previous deed, ...	ib.
Form of conveyance, ...	ib.
Intimation when moveables in hands of third party, ...	410
<i>Bonâ fide</i> sale transfers goods to purchaser without delivery, ...	ib.
Qualifications of rule, ...	ib.
Effect of instrument of possession, ...	ib.
Cases where possession ineffectual to establish ownership, ...	ib.
Owner of incorporeal, can only give right to enforce recovery, ...	281
<i>See Heritable and Moveable—Maritime Writs.</i>	
MULTIPLEPOINDING—	
May be used in order to complete diligence begun by arrestment, ...	524
Not necessary where arrestment at instance of Crown, ...	ib.
MULTIPLICATION OF SUPERIORS. See Superior and Vassal.	
MUTUAL SETTLEMENT—	
How far revocable, ...	898
Cannot be subscribed by same notary for both parties, ...	43
NAME—	
Judicial authority not required for change of surname, ...	201
Except in the case of notaries, ...	ib.
NARRATIVE CLAUSE—	
Contents of, ...	200
Place of grantor's abode to be specified in deeds of consent under Entail Amendment Act, ...	ib.
Imperfect or incorrect names and designations, ...	ib.
Grantor may be designed in testing-clause, ...	201
Change of surname, ...	ib.
Consideration or cause of granting, ...	202
Provisions of Stamp Acts as to consideration, ...	ib.
Consideration as affecting warrandice clause where not expressed, ...	ib.
In feu or blench charter, ...	545
NEGATIVE PRESCRIPTION. See Prescription.	

INDEX.

1201

PAGE

NET AND COBLE—

Legal mode of salmon-fishing, ...	568, 569
Symbols of infetment in salmon-fishings, ...	611

NEXT OF KIN—

Entitled to office of executor, ...	1042, 1043
Right of next of kin dying unconfirmed transmits to their executors, ...	1043
Risks of paying to next of kin before confirmation, ...	1044
Where two out of three next of kin confirm, the third has only a claim of debt against them, ...	1050

NEWSPAPER—

Parties who had carried on, under certain name, entitled to prevent another publication under the same or similar name, ...	375
Goodwill of, ...	376
Rights of executors of a joint proprietor in, as to future publications, <i>ib.</i>	

NON-ENTRY—

Casualty of, ...	582
Traceable to wardholding, ...	<i>ib.</i>
Different in blench and feu holdings, ...	583
Where excluded, ...	<i>ib.</i>
Has no place in burgage holdings, ...	583, 1031
Where lands sold are in non-entry, seller bound to enter, ...	645
Arrangement that purchaser shall enter, ...	672

NON-ENTRY DUTIES. See *Chancery Precept.*

Declarator of, ...	1055
When conditions of feu contravened, ...	578
Heir can enter after decree, ...	583
Superior cannot insist on service of heir whom he has called in action of non-entry, ...	1055
By superior having title to 'superiority and feu-duties,'	702, 703

NOTARIAL EXECUTION—

Of deeds, ...	38, <i>et seq.</i>
	<i>See Notary.</i>
Of bills of exchange, ...	432, 433
	<i>See Bills of Exchange.</i>

NOTARIAL INSTRUMENT—

Stamp-duty, ...	194
Under Titles to Land Acts, ...	630
Act 1858, schedule (B), ...	631, 712, 713, 761, 1074
Schedule (H), ...	872, 927, 1088
Schedule (K), ...	713, 714, 761, 1074
Schedule (M), ...	756
Act 1860, schedule (B), ...	741, 761, 1031, 1074
Schedule (E), ...	872, 927, 1088
Schedule (G), ...	761, 1031, 1074
Schedule (I), ...	756
Correction of error in instrument or in recording instrument, ...	742

	PAGE
NOTARIAL INSTRUMENT—continued.	
Completion of title to heritable securities by, ...	927, 1031, 1088
In completion of heir's title, ...	1011
NOTARIAL PROTEST—	
Of bills of exchange, ...	465, <i>et seq.</i>
<i>See Bills of Exchange.</i>	
NOTARY—	
'Falsetts' of notaries, ...	28
Provision of Act of 1540 as to subscription of a notary where party cannot write, ...	<i>ib.</i>
Act of 1555 as to party's hand being led, ...	29
Act of 1579 as to subscription of two notaries before four wit- nesses, ...	29, 30
Notary's subscription, ...	36
Judicial authority necessary for change of surname, ...	201
Notarial execution, ...	38, <i>et seq.</i>
Contents of docquet, ...	40, 42
Marginal additions, ...	41
Reading of deed to party, ...	<i>ib.</i>
What if the party is able to write?	42
Notary ought to have no concern with the deed, ...	43
Same notary cannot subscribe for both parties to mutual contract, ...	<i>ib.</i>
Subscription of notaries not required to affidavits before magis- trates by persons who cannot write, ...	43, 44
Notaries may sign for blind persons who can write, ...	44, 45
Execution of testaments, ...	38, 905
<i>See Testaments—Blind Persons.</i>	
Where party can subscribe by initials only, ...	46
Notary subscribing for a party cannot attest subscription of him- self and co-notary, ...	48
Notarial intimation of assignation, ...	295
Same person cannot be procurator and notary, ...	300
Duties of notary in giving sasine, ...	607
Who may act as notary in sasines?	608
Who may protest bill?	467
Protocols of notaries, ...	618
British consul acts as notary abroad, ...	970
NOTICE—	
Of dishonour of bill, ...	462
Mode of giving notice, ...	465
<i>See Bills of Exchange.</i>	
To next heir of entail, as to improvements, ...	986
NOTOUR BANKRUPTCY, ...	769, 770
NOVA SCOTIA—	
Infertment in, ...	616
NOVATIO—	
Extinction of debt by, ...	320
Not to be classed with delegation, ...	<i>ib.</i>

NOVATIO—continued.

Bond by principal and cautioners not innovated by bill of principal and new cautioner, ...	335
Non-delivery of document of debt is against plea of, ...	<i>ib.</i>
Law agent does not innovate account by taking bond or bill, ...	<i>ib.</i>
Heritable debt, ...	335, 336
Bond by heir of entail for sum in bill by entailer, ...	336

NOVODAMUS—

Purpose of charter or clause of, ...	1059
Effect of term 'used and wont' in charter, ...	1060
Superior giving up his right to casualties by charter of, ...	586
Of no value if superior has already given out same subjects, ...	1060
Clause of, may be incorporated with charter of resignation, ...	687
Crown charter of, ...	705
Requires consent of Commissioners of Woods and Forests, and sign-manual of Sovereign, ...	<i>ib.</i>

NUISANCE—

Prohibition of, in feu-right, ...	575
---	-----

NUNCUPATIVE—

Testaments, how far valid, ...	78
--------------------------------------	----

OATH—

To inventory of personal estate, ...	1035
Before whom taken, ...	<i>ib.</i>
Judicial ratification of deeds by married women on oath, ...	127

OBLIGATION—

Subject-matter of obligations, ...	136, <i>et seq.</i>
<i>See Unlawful Contracts.</i>	
Personal obligations by foreigners, and by Scotchmen out of Scotland. <i>See Foreign Deeds.</i>	
Personal obligations construed according to <i>lex loci contractus</i> , ...	88
Extinction of obligations. <i>See Discharge.</i>	
To convey lands, ...	548, 549
Assignment of, completed by intimation, ...	716

OBLIGATION TO INFECT—

In disposition, ...	639, <i>et seq.</i>
Need not now be specified, ...	640, 641

*OFFER.**See Sale.**OFFICE—*

Interference with freedom of election to, ...	140
Buying and selling offices of public trust, ...	141
Transactions as to emoluments, ...	141, 142

ORIGINAL CHARTER—

Province of, ...	544
<i>See Charter.</i>	

ORKNEY AND SHETLAND—

Allodial lands of, ...	532
------------------------------	-----

	PAGE
ORKNEY AND SHETLAND—continued.	
Heirs require no service, ...	999
<i>Induciae</i> of charge against parties resident in, ...	504
OUTLAWRY—	
Incapacity arising from, ...	134
Does not deprive party of power over the fee of his estate, ...	<i>ib.</i>
Debtor's outlawry does not interrupt prescription of bill, ...	486
OVERSMAN—	
Appointment of, by arbiters before entering on submission, ...	366
Must be chosen by both arbiters, ...	<i>ib.</i>
Powers of, contingent on arbiters differing, ...	367
Devolution may be partial, if subject of reference admit of settlement in detail, ...	<i>ib.</i>
Power of prorogation, ...	368
<i>See Arbitration—Decree-Arbitral—Submission.</i>	
PACTUM DE HÆREDITATE VIVENTIS—	
Sale by tutors of portion of pupil's expected inheritance, ...	149
Of contingent right of succession of heir of entail, ...	<i>ib.</i>
PACTUM DE QUOTA LITIS, ...	152
PACTUM ILLICITUM. <i>See Unlawful Contracts.</i>	
PAGE—	
Provisions of Act of 1696 as to numbering, signing, and specifying number of pages, ...	32, 33, 58-60
Marking of pages dispensed with in 1857, ...	33, 60
Specification of pages in docket annexed to instrument of sasine, ...	613, 614
Pagination of instrument of sasine, ...	614
PAISLEY—	
Tenure of booking in, ...	743
PARENT AND CHILD—	
Conjunct rights to. <i>See Destination—Service.</i>	
Bond by parent to child requires no delivery, ...	102
PARES CURLÆ, ...	541
Renewal of investitures in presence of, ...	1000
PARLIAMENT, ACTS OF. <i>See INDEX OF STATUTES.</i>	
PART AND PERTINENT—	
In disposition of lands, ...	563
Falls under disposition, whether expressed or not, ...	<i>ib.</i>
Exception as to <i>regalia</i> , ...	563, 568
And teinds, ...	569
Mills, ...	564
Minerals, ...	<i>ib.</i>
Where lands bounded by a stream, ...	<i>ib.</i>
Trout-fishing, ...	565
Lochs, ...	<i>ib.</i>

INDEX.

1205

PAGE

PART AND PERTINENT—*continued.*

Pertinents of barony bounded by sea, ...	566, 567
Discontiguous pertinents, ...	567
Seat in parish church—burying-ground, ...	<i>ib.</i>
Acquisition of discontiguous lands by possession, ...	<i>ib.</i>
Except where boundaries are specified, ...	560
Such acquisition excludes claims founded on titles, but without possession, ...	568

PARTNERSHIP—

Implies joint and several liability for debts, ...	248
<i>See Company.</i>	

PASTURE FARMS. *See Assignment to Rents.*

PATENT, LETTERS—

Usually give monopoly of invention for fourteen years, ...	313
Transferable by assignment, ...	<i>ib.</i>

PATRONAGE, RIGHT OF—

Symbols of infeftment in, ...	611
Separate Act of infeftment necessary, ...	616

PAYMENT—

By heir of entail, ...	967
To wrong party <i>bonâ fide</i> , ...	330
To factor, ...	331
Presumed to be made by proper debtor, ...	332
<i>See Discharge—Error.</i>	

PENALTY—

In personal bond, ...	241
Covers only necessary charges, ...	<i>ib.</i>
Uniformly stated at a fifth of principal, ...	<i>ib.</i>
Expenses of process against debtor, ...	242
Decree <i>in foro</i> —in absence, ...	<i>ib.</i>
How far available to cautioner paying on assignation, ...	<i>ib.</i>
Security for, in bond and disposition in security, ...	1068

PENSION—

From Crown not arrestable, ...	520
--------------------------------------	-----

PERSONAL BOND—

History and form of, ...	232
Sums and dates to be stated in words, ...	232, 241
<i>Exceptio non numeratæ pecuniæ</i> , ...	233
Obligation to pay, ...	<i>ib.</i>
Recital of debt, with conveyance in security, not a bond, ...	<i>ib.</i>
Bond obliging only granter's heirs and executors sustained, ...	234
Bond obliging granter and his heirs does not affect heirs of entail, ...	<i>ib.</i>
Creditor should be expressly relieved from necessity of discussion, ...	<i>ib.</i>
<i>See Discussion.</i>	
Succession to, ...	238, <i>et seq.</i>
<i>See Heritable and Moveable.</i>	
Seclusion of executors, ...	240
Effect of seclusion as regards succession, ...	241

	PAGE
PERSONAL BOND— <i>continued.</i>	
Term of payment, ...	241
Stipulation for penalty, ...	<i>ib.</i>
See <i>Penalty.</i>	
Obligation to pay interest, ...	242
See <i>Interest.</i>	
Clause of registration, ...	247
Bond by two or more obligants, ...	<i>ib.</i>
When subject divisible, liability is <i>pro ratâ</i> , ...	<i>ib.</i>
When bound 'jointly and severally,' liability is <i>in solidum</i> , ...	248
Also when bound as 'full debtors,' or 'co-principals and full debtors,'	<i>ib.</i>
Also when copartnery implied, ...	<i>ib.</i>
Also when subject indivisible, ...	<i>ib.</i>
Damages for non-performance due by law, liability <i>in solidum</i> , ...	<i>ib.</i>
But <i>pro ratâ</i> due under bond, ...	<i>ib.</i>
Liabilities of principal and cautioner, ...	249
Relief of obligants <i>inter se</i> , ...	<i>ib.</i>
See <i>Relief.</i>	
Effect of non-subscription of obligant named, ...	250, 255
Bond containing joint obligation for interest only, ...	250
Separate collateral obligation for interest, ...	<i>ib.</i>
Fixed rate of interest for term of years, ...	251
Bond to one in liferent and another in fee, ...	<i>ib.</i>
Trust for liferenter and fiar, ...	252
Bond to trustees, ...	<i>ib.</i>
To banks, etc., ...	<i>ib.</i>
See <i>Cash-Credit Bond—Bond of Annuity—Bond of Caution—Bond of Corroboration.</i>	
PERSONAL DILIGENCE ACT—	
Decree to contain warrant to charge and arrest and poind, ...	220, 500
Sheriff-court decree, ...	501
Execution on writ registered in Inferior Court competent only within jurisdiction, ...	217
Charge on decree against a company, ...	501
Proper firm, ...	<i>ib.</i>
Not necessary to cite partners, ...	<i>ib.</i>
Except in case of descriptive firm, ...	<i>ib.</i>
Form of charge, ...	502
Duties of messenger, ...	<i>ib.</i>
Debtor's dwelling-place, ...	<i>ib.</i>
Debtor furth of Scotland, ...	503
Special warrant required for edictal charge on letters of horning, ...	<i>ib.</i>
Subject-matter of charge, ...	<i>ib.</i>
Partial payments to be specified, ...	<i>ib.</i>
Charge by company, ...	<i>ib.</i>
By foreigner, ...	<i>ib.</i>
<i>Inducie</i> , ...	504

INDEX.

1207

PAGE

PERSONAL DILIGENCE ACT—*continued.*

Charge on bill or promissory-note, etc., ...	504
Days of charge never less than six, ...	<i>ib.</i>
Poinding and imprisonment, ...	<i>ib.</i>
Authentication of extract, ...	505
Execution of charge, ...	<i>ib.</i>
Subscription of one witness sufficient, ...	<i>ib.</i>
Execution only is registered to accumulate interest with principal, ...	506, 507
Authentication of execution—statutory requisites, ...	506
Messenger must have warrant in his possession, ...	<i>ib.</i>
Presumption that he has, ...	<i>ib.</i>
Registration of execution in Register of Hornings, ...	507
Equivalent to denunciation as rebel, ...	<i>ib.</i>
Single and liferent escheat, ...	<i>ib.</i>
Warrant to imprison, ...	<i>ib.</i>
<i>Inducias</i> must expire before caption raised, ...	<i>ib.</i>
Vitiations in minute, etc., ...	508
Notice of partial payments in minute, ...	<i>ib.</i>
Debtor may be set free on consigning amount due in magistrate's hands, ...	<i>ib.</i>
Debtor may be arrested in prison by other creditors, ...	<i>ib.</i>
Apprehension of debtor, ...	<i>ib.</i>
Illness of debtor, ...	<i>ib.</i>

See Bond of Presentation—Sanctuary.

PERSONAL RIGHT TO LAND, ...	577, 578
Conveyance of, ...	706, <i>et seq.</i>

See Disposition and Assignment.

Not affected by terce, ...	795
Title in favour of heir to ancestor's unconfirmed infeftment on disposition with <i>a me</i> holding, ...	999
Completion of heir's title to, when lands held of Crown, ...	1010
Of subject-superior, ...	1013

PERTINENT. *See Part and Pertinent.*

PIT AND GALLOWS, ...	539
----------------------------	-----

PLACE OF SIGNING DEEDS, ...	60
-----------------------------------	----

PLAN—

Advantage of, in framing descriptions of lands, ...	557, 559, 560
---	---------------

POINDING, PERSONAL, ...	512
On decree of Inferior or Supreme Court, ...	513
Warrant to poind now contained in decree, ...	<i>ib.</i>
Can proceed only on expiry of <i>inducias</i> , except as to deceased Crown debtor, ...	<i>ib.</i>
Subjects of poinding, ...	<i>ib.</i>
Growing corn may be poinded, ...	<i>ib.</i>
Implements of husbandry may not, if debtor has other goods, ...	514

POINDING, PERSONAL—*continued.*

Goods sold but not delivered poindable by seller, unless re-sale intimated,	514
Ships,	<i>ib.</i>
Where debtor is joint proprietor or liferenter,	<i>ib.</i>
Effects within royal residence,	<i>ib.</i>
Distinctions between poinding and arrestment,	514, 515
See <i>Personal Diligence Act—Eachquer Court Act.</i>	

POINDING THE GROUND—

By and against whom competent,	1099
On decree of Sheriff,	<i>ib.</i>
After sequestration of debtor,	1075, 1100
By heritable creditor,	1075
By assignee,	1089
In virtue of ground-annual right,	1065, 1067
For interest on interest of debt makes claim to interest real, and adjudication may be led for it,	1096, 1097

POSSESSION—

Of parts and pertinents,	567
Of salmon-fishings,	568
Prescriptive possession,	657-659

POSTHUMOUS CHILD—

Entitled to share of provisions,	839
----------------------------------	-----

POSTNUPTIAL MARRIAGE SETTLEMENT—

Legal effect of,	850
Provisions not so onerous as in antenuptial contract,	<i>ib.</i>
Rational provisions will be sustained,	<i>ib.</i>
How far revocation is competent,	851
Wife's revocation of deed judicially ratified by herself,	<i>ib.</i>
Where there is also antenuptial contract,	<i>ib.</i>
Delivery to wife unnecessary,	102
Legitim not affected by,	852
Children's provisions may be made irrevocable,	<i>ib.</i>
Such provisions are gratuitous,	169, 852

See *Provision.*

POWER—

To bequeath, dispoise, or burden estate,	874
To apportion children's provisions,	837-839

PRÆCEPTIO HEREDITATIS,

By heir of entail,	872
	954, 968

PRECEPT OF SASINE—

Now unnecessary,	542, 646
Formerly separate from, afterwards incorporated with, charter,	542
Objects of,	602
Older and modern form of,	<i>ib.</i>
Must point out dispoisee and lands,	602, 608
Controlled by dispositive clause,	550, 608, 995

INDEX.

1209

PAGE

PRECEPT OF SASINE—*continued.*

But, when not inconsistent, may supplement dispositive clause,	550
Implies warrant to use proper symbols,	603
Granter cannot assign,	<i>ib.</i>
To trustees may be assigned by them,	881
Sasine of less than contained in precept,	623
Definite and indefinite precept in disposition,	646
Not used in burgage holdings,	738
Stamp-duty, where two or more precepts in one deed,	192

PRECEPT OF CLARE CONSTAT.

See Clare Constat—Chancery Precept.

PRE-EMPTION—

Of shares by joint-stock company,	405
Clause of, in feu-charter,	573
Implement of clause,	579

See Charter.

PREMONITION, . (See *Heritable Securities.*) 1071

PRESCRIPTION—

Of forty years, introduced in 1617,	654
Years of minority deducted,	654, 658
Prescriptive progress of titles,	653, <i>et seq.</i>
Heir's titles,	654
Disposnee's title,	655, 656
Burgage lands,	655
Warrants of sasine in favour of disposnee,	655, 659
Prescriptive title excludes prior titles,	655
Apparent heir may possess on ancestor's infestment,	656
Can disposnee ascribe possession to his author's infestment?	<i>ib.</i>
Title completed after litigiousity,	<i>ib.</i>
Where founded on decree of adjudication,	<i>ib.</i>
Legal term of reversion,	<i>ib.</i>
Right of redemption excluded by possession on charter and sasine for forty years after expiry of legal,	<i>ib.</i>
Possession alone insufficient,	657
Cases where sasine unnecessary,	<i>ib.</i>
Decree of proving the tenor of sasine preferable to extract,	<i>ib.</i>
Consolidation of property and superiority by,	731
Triennial prescription of tradesmen's accounts,	337
Vicennial prescription of services,	1027
Prescription against entail,	967, 968
Adverse possession necessary to support plea,	989
Of arrestments,	525
Of bills and notes,	477
Extinction of debts by,	321
Presumption of payment,	337
Distinction between, and statutory limitation of cautionary obligations,	<i>ib.</i>
Plea not elided by reference to debtor's oath,	<i>ib.</i>

See Searches—Limitation.

	PAGE
PRESENTATION, BOND OF, ...	509
Obligation to present cannot be proved by parole, ...	510
Illness or death of debtor, ...	<i>ib.</i>
Cautioner not liberated through fault of debtor, ...	511
Septennial limitation not applicable to cautioner in ordinary bond of presentation, ...	263, 264
Granter paying debt, on failure to present, not entitled to relief from proper cautioners, ...	277
PRESENTER OF SIGNATURES, ...	704, 1006, 1007
PRESERVATION, REGISTRATION FOR.	
<i>See Registration for Preservation.</i>	
PRIVILEGED WRITINGS, ...	73, <i>et seq.</i>
<i>See Holograph—Testamentary Writings—Re mercatorid— Foreign Deeds.</i>	
SPECIAL CASES OF PRIVATE PRIVILEGE, ...	79-81
Statutory solemnities dispensed with, ...	79
Adoption of informal writing as part of probative deed, ...	80, 81
Reference in probative deed to informal writing, ...	81
Subscription of docquet on envelope enclosing writing not sufficient, <i>ib.</i>	
Additional solemnity prescribed by party in reference to his own will, ...	82
PROBATE—	
Confers title to sue in Scotland, ...	87
<i>See Confirmation of Executor.</i>	
PROBATIVE—	
Register of Probative Writs, ...	215
Deeds containing clause of registration may be registered as pro- bative writs, ...	217
Principal deed given back to party, ...	218
<i>See Registration for Preservation.</i>	
PROCURATION—	
Bill signed by, ...	436-438
<i>See Bills of Exchange.</i>	
PROCURATORY OF RESIGNATION.	
<i>See Resignation.</i>	
PROGRESS—	
Legal progress of titles, ...	653, <i>et seq.</i>
<i>See Prescription—Sale—Searches.</i>	
PROGRESS, CHARTER BY.	
<i>See Charter.</i>	
PROGRESSIVE STAMP-DUTY—	
Regulated by number of words in deed, ...	194
Schedules, etc., annexed to deeds, ...	<i>ib.</i>
Not required in inventory of personal estate, ...	1040
<i>See Stamp-Duty.</i>	
PROHIBITION—	
In feu-charter. <i>See Conditions—Subinfeudation.</i>	
In entail. <i>See Entail.</i>	

INDEX.

1211

	PAGE
PROMISSORY-NOTES, ...	428, <i>et seq.</i>
By insolvent debtor, ...	170
Distinction between, and bills, as to 1696, cap. 5, ...	<i>ib.</i>
<i>Ad valorem</i> stamp-duty, ...	194
Granter of, as cautioner, not entitled to benefit of discussion, ...	268
<i>See Bills of Exchange.</i>	
PROPER INVESTITURE, ...	541
PROPERTY—	
Separation from superiority in making up title, ...	693, <i>et seq.</i>
<i>See Consolidation.</i>	
PROROGATION OF SUBMISSION—	
Indorsed on submission, ...	365
<i>Rebus ipsis et factis</i> , ...	<i>ib.</i>
Power to arbitrate implied in special circumstances, ...	<i>ib.</i>
Authentication of, ...	<i>ib.</i>
Usually for year and day, ...	<i>ib.</i>
PROTEST OF BILL, ...	465, <i>et seq.</i>
Recorded in what register, ...	216
<i>See Bills of Exchange.</i>	
Of bank draft, ...	489
PROTOCOLS OF NOTARIES, ...	618
PROVING THE TENOR—	
Of a sasine, ...	657
Tenor of unstamped deed cannot be proved, ...	199
PROVISION—	
To wife and children by marriage-contract.	
<i>See Marriage-Contract.</i>	
By general disposition and settlement, ...	872
Under entail, ...	979, 980
Bond of, ...	852
To wife already provided for, ...	<i>ib.</i>
Whether in addition to former provision, or to legal claims, ...	852, 853
To children, whether or not additional, ...	853
Exclusion of legitim by special provision, ...	855
Term of payment and vesting, ...	856
Day certain, ...	<i>ib.</i>
Lapses by predecease of grantee, ...	<i>ib.</i>
Unless survived by children, ...	<i>ib.</i>
Even if destined to heirs and assignees, ...	857
Substitution in bonds of, to children, ...	<i>ib.</i>
Clause of return, ...	<i>ib.</i>
Assignment of bond, ...	858
Predecease of institute, ...	<i>ib.</i>
Service of heir of provision, ...	1018, <i>et seq.</i>
<i>See Service—Heir.</i>	
PROXY—	
Cannot be after-stamped, ...	198

PUBLIC COMPANIES, ...	PAGE 388
See <i>Joint-Stock Companies</i> .	
PUBLICATION—	
Registration for.	
See <i>Registration for Publication—Sasine</i> .	
Of letters of inhibition, ...	671, 1098
PUPIL, ...	107, 108
Persons and affairs of, under charge of tutors, ...	108
Distinction between legal position of pupils and minors, ...	109
Cannot contract or grant deeds, ...	<i>ib.</i>
Completion of title in pupil's person, ...	110
Power to borrow money on security of pupil's estate, ...	111
Pupil's moveables may be sold, ...	<i>ib.</i>
Court will authorize sale of heritage only on ground of necessity, ...	112
See <i>Cognition and Sale</i> .	
Judicial proceedings at instance of or against, ...	114
Appointment of tutor <i>ad litem</i> , ...	<i>ib.</i>
Cannot make a testament, ...	904
Cannot be instrumentary witness, ...	47
May be confirmed executor, ...	1041
Intimation of assignation to pupil debtor, ...	298, 299
See <i>Tutor</i> .	
PUPILS PROTECTION ACT—	
Enlarges Court's authority to grant special powers to tutors, etc., ...	111
Procedure for obtaining special powers, ...	116
Provisions of, as to guardians' accounts, etc., ...	246
Does not reach testamentary tutors, curators, or trustees, or their factors, ...	<i>ib.</i>
Provision of, as to bonds by guarantee association for judicial factors, ...	395
Applies to guardians of insane persons, ...	120, 121
PURCHASER OF LAND—	
Obligations of, in regard to lands under lease, ...	645
Where lands sold before tenant's entry, ...	<i>ib.</i>
See <i>Sale</i> .	
QUADRIENNIUM UTILE, ...	115
QUÆQUIDEM CLAUSE—	
In charter of resignation, ...	686
When charter in favour of assignee, ...	710
QUIA EMPTORES TERRARUM—	
English statute, ...	636, 1064
QUORUM—	
Of trustees, ...	879
Majority is a quorum by law in gratuitous trusts, ...	879, 880
Of factors, ...	419
Arrestment in the hands of quorum, ...	523

RAILWAY—

Transfer of mortgages by endorsement under Act of 1861, ...	287, 288
Endorsement exempt from stamp-duty, ...	288
Railway company cannot invest funds in stock of another railway company, ...	405

RANKING AND SALE—

History of judicial sale of debtor's lands, ...	767, <i>et seq.</i>
Actions of sale, reduction-improbaton, and multiplepointing superseded by action of ranking and sale, ...	769
Creditor must hold real security over lands, ...	<i>ib.</i>
Must be in possession of lands, ...	<i>ib.</i>
What constitutes possession, ...	<i>ib.</i>
Proof of notour bankruptcy, ...	<i>ib.</i>
Bankrupt's whole lands must be included, ...	770
Witnesses examined on oath, ...	<i>ib.</i>
Action may proceed without production of titles, ...	<i>ib.</i>
Memorial and abstract of proof, prepared by common agent, ...	<i>ib.</i>
Procedure at sale, ...	<i>ib.</i>
Where no sale takes place, ...	<i>ib.</i>
Where bankrupt is heir of entail, ...	<i>ib.</i>
Decree may be extracted on purchaser finding caution for price, ...	<i>ib.</i>
Consignation of price, ...	<i>ib.</i>
Petition for getting up bond of caution, ...	771
Effect of decree of sale, ...	<i>ib.</i>
Charter of sale, ...	<i>ib.</i>
Operates confirmation, ...	<i>ib.</i>
Application of price, ...	<i>ib.</i>
Debtor not simply discharged, ...	<i>ib.</i>
Debts kept up as collateral security to purchaser, who cannot assign them, ...	772
Purchaser has no better title than bankrupt had, ...	<i>ib.</i>
Creditors preferred by priority of infetment, ...	<i>ib.</i>
Duties of common agent, ...	<i>ib.</i>
He cannot purchase, ...	<i>ib.</i>
If surplus price falls to debtor's heir, he must make up title thereto, ...	<i>ib.</i>

By APPARENT HEIR.

Competent whether estate bankrupt or not, ...	773
Incompetent after service involving universal liability, ...	<i>ib.</i>
Not excluded by behaviour as heir, ...	<i>ib.</i>
Nor by service <i>cum beneficio inventarii</i> , or with specification annexed, ...	<i>ib.</i>
Nor by renunciation in action of constitution, ...	774
Competent when lands held under unrecorded entail, ...	<i>ib.</i>
Creditors cannot interfere, ...	<i>ib.</i>
Where a pursuer dies, ...	<i>ib.</i>
Form of summons, ...	<i>ib.</i>
Where nearer heir appears, ...	<i>ib.</i>

	PAGE
RANKING AND SALE—<i>continued</i>.	
Reversion of price belongs to heir, ...	774
Decree of sale sufficient title to reversion, ...	<i>ib.</i>
JUDICIAL SALE of right of heir of entail, ...	956
RATIFICATION, JUDICIAL—	
Of deeds granted by married women, ...	126
May be made notarially, ...	<i>ib.</i>
Usually before a magistrate, ...	<i>ib.</i>
Wife's conveyance of her own estate with husband's consent valid without ratification, ...	<i>ib.</i>
What if wife compelled to grant ratification?	126, 127
Ratification does not infer delivery, ...	105
Revocation of postnuptial settlement previously ratified by wife, ...	851
RE MERCATORIA—	
Writings in, ...	90
Privileged as regards authentication, ...	91
REAL BURDENS. See Burden—Conditions—Heritable Securities.	
RECEIPT—	
To tenant for rent, privileged writing, ...	<i>ib.</i>
Stamp-duty on, ...	194
After-stamping, ...	197
RECOGNITION, CASUALTY OF —	
Abolished in 1748, ...	531
Origin of singular successor's composition, ...	<i>ib.</i>
RECORDS. See Registers—Registration.	
REDDENDO, CLAUSE OF—	
In original charter, ...	590
Specifies payments, etc., due by vassal, ...	<i>ib.</i>
Personal services abolished, and money compensation substi- tuted, ...	<i>ib.</i>
What kind of prestations still lawful, ...	<i>ib.</i>
Reference to, in charters by progress, ...	696
In writ of confirmation, ...	697
In writ of resignation, ...	698
<i>See Feu-Duty.</i>	
REDEMPTION. See Adjudication—Heritable Securities—Prescription.	
REDUCTION EX CAPITATE LECTI, ...	901, 902
REDUCTION-IMPROBATION—	
By superior, when conditions of feu contravened, ...	578
REFERENCE—	
Description of lands by, ...	553, <i>et seq.</i>
Destination in entail by, ...	941
To conditions of entail in subsequent titles, ...	966
To conditions of entail, and destination, in special service, ...	1017
To <i>tenendas</i> and <i>reddendo</i> in charter by progress, ...	696
Real burden cannot be constituted by, ...	1068

INDEX.

1215

PAGE

REGALIA—

Do not pass as part and pertinent, ...	563-568
<i>Majora</i> and <i>minora</i> , ...	568

REGALITY, LORDS OF, ...	539
-------------------------------	-----

REGISTERS—

To be searched for incumbrances affecting lands, ...	665, <i>et seq.</i>
Sasine—adjudication—inhibition registers, ...	665
Where register books kept, ...	<i>ib.</i>
Any one may search, ...	<i>ib.</i>
Search in Register of Entails, ...	666
See <i>Entail</i> .	
Of interruptions of prescription, ...	<i>ib.</i>
Of probative writs, ...	215
Provision as to custody of Registers, ...	216
Records now available in Scotland, ...	216, 217

See *Extract—Registration*.

REGISTRATION FOR PRESERVATION AND EXECUTION—

Clause of registration, ...	209, <i>et seq.</i>
Distinct from registration for publication, ...	209
Consent to registration for execution, ...	<i>ib.</i>
Appointment of procurators, ...	210
Interposition of Court's decree, ...	<i>ib.</i>
Extract decree contains copy of its warrant, ...	211
Extract equally probative with principal, ...	<i>ib.</i>
Except in cases of improbation, ...	<i>ib.</i>
Institution of Commissary Courts, ...	<i>ib.</i>
Power of registration given to Commissaries, ...	<i>ib.</i>
Reference in Act of 1584 to registration, ...	<i>ib.</i>
Old forms of extract, ...	212
Procuratory for registration alone does not authorize diligence, ...	<i>ib.</i>
Registration for preservation, ...	213
Consent of procurators, ...	<i>ib.</i>
Registration after death of grantor and grantee made lawful, ...	214
Modern form of extract, ...	<i>ib.</i>
Privileges of summary diligence extended to bills and notes, ...	215
Register of probative writs, ...	215-217
Where no clause of registration, registration is for preservation only, ...	217
Deeds containing clause of registration may be registered as probative writs, ...	<i>ib.</i>
Act 49 Geo. III., prohibiting registration in Commissary Courts, ...	
Burgh Courts, etc., ...	216
Exceptions from the Act, ...	<i>ib.</i>
Provision as to custody of registers, ...	<i>ib.</i>
Records now available in Scotland, ...	216, 217
Execution on writs registered in Inferior Court, competent only within Court's jurisdiction, ...	217
Authentication of extracts of deeds, ...	<i>ib.</i>
Principal deeds recorded as probative writs are given back, ...	218

	PAGE
REGISTRATION FOR PRESERVATION, <i>ETC.</i> — <i>continued.</i>	
Deeds recorded in other registers are retained, ...	218
Deed may be taken out of Books of Session within six months after in-giving, if not booked, ...	<i>ib.</i>
Court's authority to get up deeds from record, ...	219, 220
Authority not granted where extract will suffice, ...	219
Deed recorded in two registers, ...	220
Warrant for execution against person and estate, ...	<i>ib.</i>
Separate letters of diligence necessary as to real estate, ...	<i>ib.</i>
Appointment of procurators dispensed with, ...	<i>ib.</i>
Short clause introduced by Conveyancing Acts, ...	<i>ib.</i>
'And for more security,'	<i>ib.</i>
Clause of registration in charter, ...	601
Charter by subject superior can be recorded only in Books of Session, ...	215, 601
Clause in disposition, ...	646
In personal bond, ...	247
Unnecessary in Exchequer bonds, ...	511
Registration for preservation not <i>per se</i> equivalent to delivery, ...	105
Alterations on testing clause incompetent after registration, ...	223

REGISTRATION FOR PUBLICATION—

History of, ...	618, <i>et seq.</i>
1617, cap. 17, ordained sasines, etc., to be registered within sixty days of date, ...	619
Entire days—not <i>de momento in momentum</i> , ...	624
Establishment of general and particular registers, ...	619
Minute-book, ...	620
Preference of sasines according to priority of registration, ...	620, 624
Of bonds and dispositions in security, ...	1074
Requirements of system now in force, ...	623
Certificate by keeper, ...	<i>ib.</i>
Error in certificate, ...	625
Registration may now be at any time during life of party infeft, ...	624
Error in recording—vitiation in register, ...	<i>ib.</i>
Correction of errors in registration, ...	625
By expeding new sasine on original warrant, ...	626
By registration of conveyance under Titles Acts, ...	<i>ib.</i>
Objects and effects of registration under Titles Acts, ...	627, <i>et seq.</i>
Warrant of registration, ...	629
Correction of errors in warrant, ...	630
Registration of portions of a deed by means of notarial instrument, ...	<i>ib.</i>
Or in terms of clause of direction, ...	631, 632
Registration of conditions in feu-charter, ...	576
Of instrument of resignation <i>ad remanentiam</i> , ...	728
Registration of sasine equivalent to delivery of conveyance, ...	104
Is registration for publication in all cases equivalent to delivery?	<i>ib.</i>
Registration for publication equivalent to intimation of assigna- tion of personal right, ...	717

INDEX.

1217

	PAGE
REGISTRATION OF JOINT-STOCK COMPANIES, .	391, 395, 403
REGISTRY OF SHIPS, ...	411
Certificate of registry, ...	412
Of mortgages over ships, ...	414
<i>REI INTERVENTUS—</i>	
Improbative deeds followed by, held binding, ...	183, <i>et seq.</i>
Contract to feu lands, ...	185, 187
Leases, ...	186
Verbal promises, ...	<i>ib.</i>
Verbal agreement for lease, sale, or feu, ...	<i>ib.</i>
<i>RELATIONSHIP—</i>	
Not a good objection to an instrumentary witness, ...	47
Nor to notary protesting bill, ...	467
Or giving sasine, ...	608
<i>RELIEF—</i>	
Competent to heir or executor liable <i>subsidiarie</i> for ancestor's debts, ...	238
Discharge of subsidiary liability and assignation by creditor, ...	238, 273
Cautioner bound as principal should on paying take assignation to a third party, ...	276, 342
Obligants severally bound are severally liable to cautioner, ...	249
Joint-obligants' relief <i>inter se</i> , ...	<i>ib.</i>
Effect of joint-obligant's insolvency, ...	250
Assignation by creditor not necessary, ...	<i>ib.</i>
Cautioner's relief against principal and co-cautioners, ...	269, 270
Cautioner in cash-credit bond may sue principal for total relief without payment, ...	270
Cautioner making premature payment has no immediate re- course, ...	270, 273
Cautioner for fidelity of agent may withdraw, ...	271
When debt past due, cautioner's relief on paying is immediate, ...	273, 338
Abatement obtained by one cautioner must be communicated to the others, ...	275
Also security given by principal, ...	<i>ib.</i>
But not when given by third parties, ...	<i>ib.</i>
Probative declaration of trust to be executed by assignee, ...	343
Trustee entitled to relief from expenses, ...	<i>ib.</i>
Additional cautioner's relief, ...	276
Provision of Mercantile Law Amendment Act, ...	277
Cautioner not entitled to relief from damages arising by his own fault, ...	<i>ib.</i>
May lose recourse against his co-cautioners, ...	341
RELIEF, BOND OF, ...	269
<i>RELIEF, CASUALTY OF—</i>	
Payable on heir's succession to feu or blench holdings, ...	583
Not exigible in burgage holdings, ...	1031
Tailkied investiture recognised by superior, ...	1053
See <i>Composition</i> .	

	PAGE
RELIEF, OBLIGATION OF—	
From augmentations of stipend, in feu-charter, ...	588
Obligation ought to be specially assigned in conveying feu, ...	594, 644
From feu-duties, public burdens, etc., in feu-charter, ...	598
In disposition, ...	644, 645
Omission to repeat, in charter by progress, ...	687
RELINQUISHMENT—	
Of superiority, ...	734
Acceptance of, ...	735
RELOCATION, TACIT, ...	1108
	<i>See Lease.</i>
REMOVAL—	
Of tenant by landlord, ...	1107
Tenant's consent to remove without warning not liable in stamp-duty, ...	192
Of proprietor by heritable creditor, ...	1076
RENTAL—	
How estimated for Aberdeen Act Annuity, ...	804
For provisions to children, ...	829
Fixed as at time of granter's death, ...	807, 829
For locality provision, as at date of granting provision, ...	807
RENT CHARGE.	<i>See Ground-Annual.</i>
RENTS—	
Arrestment of, ...	520
Assignment to, ...	594, <i>et seq.</i>
	<i>See Assignment to Rents.</i>
RENUNCIATION—	
Of lease, ...	1113
Of casualties of superiority, ...	586
REQUISITION—	
For payment of personal bond, ought to be given three months before a term, ...	243
For payment of heritable bond, ...	1012
RESERVED BURDEN.	<i>See Heritable Securities.</i>
RESIGNATION—	
Power of, to trustees, ...	886, 906
RESIGNATION, ENTRY BY—	
Contrasted with entry by confirmation, ...	690
Procuratory of resignation in disposition, ...	642
Does not fall by death of granter or grantee, ...	642, 729
Charter of resignation operates confirmation of necessary writs, ...	688
Clauses of charter, ...	685
Fraudulent practice of obtaining charters with enlarged boundaries, ...	686
Objects of <i>quæquidem</i> clause, ...	<i>ib.</i>
Deduction of titles necessary, ...	643

INDEX.

1219

PAGE

RESIGNATION, ENTRY BY—*continued.*

Clause of <i>novodamus</i> may be introduced, ...	687
Provisions of original charter held as repeated, ...	<i>ib.</i>
Charter contains no warrandice, ...	<i>ib.</i>
Reservation of bygone and current feu-duties, ...	687, 688
Delivery of charter without reservation implies discharge, ...	688
Granting of charter not to prejudice superior's right to property fee, ...	<i>ib.</i>
Resigner not divested till infeftment taken on charter, ...	<i>ib.</i>
Effect of second disposition by last vassal first followed by infeftment, ...	<i>ib.</i>
Before infeftment on charter, precept in last vassal's disposition may be executed, ...	689
Penalty on superior receiving successive resignations in favour of different parties, ...	<i>ib.</i>
Sasine on charter, ...	<i>ib.</i>
Superior entitled to require infeftment of grantee, ...	<i>ib.</i>
Superior's title to superiority, ...	<i>ib.</i>
Error in entering by resignation in place of confirmation, how rectified, ...	698, <i>et seq.</i>
Vassal may now insist on reference to <i>tenendas</i> and <i>reddendo</i> , ...	696
Entry of assignee, ...	710, <i>et seq.</i>

INSTRUMENT OF RESIGNATION.

Must deduce titles after death of either party, ...	642
Resignation <i>in favorem</i> distinguished from resignation <i>ad remanentiam</i> , ...	642, 711
Instrument <i>in favorem</i> abolished in 1845, ...	643, 711
Clause of resignation <i>in favorem</i> understood, unless expressed as <i>ad remanentiam</i> , ...	723
Resignation <i>ad remanentiam</i> , ...	721, <i>et seq.</i>
Instrument of resignation <i>ad remanentiam</i> , ...	726
Now unnecessary, ...	727
Erasures in instrument, ...	<i>ib.</i>
Instrument of resignation <i>propriis manibus</i> , ...	<i>ib.</i>
Registration of instrument of resignation <i>ad remanentiam</i> , ...	728
May now take place at any time during grantee's life, ...	<i>ib.</i>

Titles of superior and vassal must be completed during their lifetime, ...	<i>ib.</i>
Superiority held by liferenter, ...	<i>ib.</i>
Effect of resignation <i>ad remanentiam</i> , ...	728, 729
Competent only in hands of immediate superior, ...	730

WRIT OF RESIGNATION—

By Crown, ...	705
By subject superior, ...	697
Effect of recording writ, ...	698, 699
Error in Titles Act of 1858 corrected in 1860, ...	699

	PAGE
RESIGNATION, ENTRY BY— <i>continued.</i>	
Authentication of writ, ...	669
Stamp-duty, ...	700
Charter or writ of resignation assignable, ...	1054
Charter of resignation and confirmation, ...	691
Clauses of combined charter, ...	693
Now unnecessary, ...	688, 692, 698
RESIGNATION AND SASINE—	
In burgage holdings, ...	737, <i>et seq.</i>
Instrument of, ...	739
RESOLUTIVE CLAUSE—	
Unnecessary in feu-charter, ...	574, 575
In entail, ...	957, <i>et seq.</i>
	<i>See Entail.</i>
RESPONDENTIA, BOND OF—	
By whom granted, ...	416
Doubtful whether security only personal, ...	417
RESTRICTION OF SECURITIES, ...	1090
RETOUR DUTY, ...	582
RETOUR OF SERVICE, ...	1002
RETROCESSION—	
Old and new forms of, ...	318
Intimation necessary, ...	319
Not necessary in transference of heritable securities, ...	1090
RETURN, CLAUSE OF—	
In bond of provision, ...	857
REVERSIONARY INTERESTS—	
Conveyance of, ...	310, <i>et seq.</i>
	<i>See Legacies.</i>
REVOCATION—	
Of postnuptial settlements, ...	851
Of prior deeds by <i>mortis causâ</i> deed, ...	897, <i>et seq.</i>
Right to revoke testament cannot be given up, ...	898
Rules as to mutual deeds, ...	<i>ib.</i>
By foreign deed, ...	<i>ib.</i>
Express or implied, ...	899
By destroying or cancelling deed, ...	<i>ib.</i>
Effect of revoking revocation, ...	900
Bankruptcy operates revocation of <i>mortis causâ</i> deed, ...	<i>ib.</i>
Deathbed revocation, ...	901
Qualified revocation, ...	902
Revocation of legacy, ...	912
<i>Donatio inter virum et uxorem</i> , ...	851
RIGHT OF ADMINISTRATION, ...	122
Excluded or renounced, ...	124
	<i>See Marriage—Married Women.</i>

INDEX.

1221

PAGE

RIGHT, TITLE, AND INTEREST—

Clause of, in disposition, ...	570
In bond and disposition in security, ...	1069

ROUP. *See Articles of Roup.*

ROYAL BURGH *See Burgh.*

SALARY—

Of Judges not arrestable, ...	520
-------------------------------------	-----

SALE—

Seller of lands bound to enter with superior, ...	645
Arrangement that purchaser shall enter, ...	672
Division of burdens between seller and purchaser, ...	645
Where sale takes place before tenant's entry, ...	<i>ib.</i>
Arrestment of unpaid price in hands of purchaser, ...	521
Of trust-estate, ...	887
Under powers in bond and disposition in security, ...	1072
Verbal agreement for, validated by <i>rei interventus</i> , ...	186
Agent cannot purchase constituent's estate, ...	149
Purchase of subjects over which client had security, held to have been for client, ...	150

SALE, MISSIVES OF, ...	647, <i>et seq.</i>
Must bind both parties, ...	647
Must specify the lands and price, ...	648
Form of missives, ...	<i>ib.</i>
Must be probative, ...	649
Offer binding until withdrawn, ...	<i>ib.</i>
Caution necessary in treating with offerers for private sale, ...	649, 650

SALE, MINUTE OR CONTRACT OF—

Its uses, ...	650
(1.) OBLIGATIONS OF SELLER, ...	<i>ib.</i>
To grant valid disposition to purchaser on payment of price, ...	<i>ib.</i>
Adjudication in implement when seller refuses to grant disposition, ...	<i>ib.</i>
Optional irritancy in case of non-payment of price by a day certain, ...	651
Undue delay will render sale void, ...	<i>ib.</i>
Risk involved under Titles Acts by using dispositive words, ...	<i>ib.</i>
Question whether seller may thus be divested, ...	<i>ib.</i>
Substantial error as to subjects will annul sale, ...	652
Is seller bound to grant disposition to a third party, or to purchaser's assignee?	652, 653
Is seller bound to grant alternative holding?	653
Obligation to deliver title-deeds, ...	<i>ib.</i>
Reference as to sufficiency of titles, ...	<i>ib.</i>
Valid legal progress, ...	653, <i>et seq.</i>
<i>See Prescription.</i>	
Seller must give unobjectionable title, ...	659, 660
Delay in giving title, ...	660

	PAGE
SALE, MINUTE OF—<i>continued.</i>	
Where seller's title is only defective, ...	661
Purchaser entitled to expense of removing doubts, ...	<i>ib.</i>
Import of stipulation that title be accepted as it stands, ...	<i>ib.</i>
Marketable title, ...	662
Purchaser's risks, ...	<i>ib.</i>
Alleged former sale, ...	663
Stipulation as to incumbrances. See <i>Searches.</i>	
Purchaser not bound to accept unofficial search, ...	665
Stipulation that seller will not furnish search, ...	666
Seller not bound to clear lands of feu-duty, ...	667
Purchaser's private knowledge of burdens, etc., ...	<i>ib.</i>
Is seller bound to discharge real warrandice?	668
Arrangements when debts are not discharged, or when debts remain burdens on land sold, ...	<i>ib.</i>
Discharge of seller and bond of corroboration by purchaser, ...	669
Creditor ought to have purchaser's personal obligation, ...	<i>ib.</i>
Purchaser should see that leases are duly stamped, ...	670
State of teinds, ...	671
Obligation to free lands of feu-duties, casualties, public burdens, etc., ...	672
Arrangement when lands in non-entry, ...	<i>ib.</i>
Where seller's title is to be under judicial discussion, ...	673
(2.) OBLIGATION OF PURCHASER—	
To pay price, ...	<i>ib.</i>
Penalty and interest, ...	<i>ib.</i>
Delay in payment, ...	<i>ib.</i>
Purchaser should consign when seller not ready to give good title, ...	<i>ib.</i>
Expense of disposition paid equally by seller and purchaser, ...	674
Submission of disputes to arbiter named, ...	<i>ib.</i>
SALE, JUDICIAL. See <i>Ranking and Sale.</i>	
SALE, CHARTER OF—	
Operates confirmation of necessary writs, ...	688
SALMON-FISHINGS—	
<i>Inter regalia</i> , ...	568
Extent of Crown's right, ...	<i>ib.</i>
Title to lands <i>cum piscariis</i> or <i>cum piscationibus</i> followed by possession equivalent to a grant of, ...	568
What sort of possession necessary, ...	568, 569, 658, 659
Accessories of, ...	569
Symbols of infeftment in, ...	611
Separate act of infeftment necessary, ...	616
Value of, taken into account in fixing amount of Aberdeen Act Annuity, ...	804
SANCTUARY, ...	509
Debts contracted within, ...	<i>ib.</i>
SASINE, INSTRUMENT OF—	
History of, ...	605, <i>et seq.</i>

INDEX.

1223

SASINE, INSTRUMENT OF—*continued.*

PAGE

Ceremony of giving sasine, ...	606
Clauses of, ...	607, <i>et seq.</i>
Invocation, ...	607
Date of, ...	<i>ib.</i>
Whether year of God and of king's reign are necessary, ...	<i>ib.</i>
Ceremony must take place on the lands, ...	608
Who may act as notary?	<i>ib.</i>
Who may act as attorney and bailie, ...	609
Narration of charter and precept, ...	<i>ib.</i>
Formerly inserted <i>ad longum</i> , ...	<i>ib.</i>
Precept and testing clause inserted <i>verbatim</i> , ...	<i>ib.</i>
Identification of warrant, ...	610
Sasine on disposition with general description, ...	558
On precept in favour of heirs not named, ...	603
Where lands not described, ...	<i>ib.</i>
<i>See Precept of Sasine.</i>	
Clause of delivery of sasine, ...	610
Symbols of delivery, ...	611
Specification of hour when sasine given, ...	612
Witnesses 'specially called and required,'	<i>ib.</i>
Contents of docquet—authentication of instrument, ...	<i>ib.</i>
Subscription of one notary sufficient, ...	<i>ib.</i>
Sasine originally written on face of a sheet, afterwards bookwise, ...	618
Number of pages must be specified in docquet, ...	<i>ib.</i>
Except when instrument written on one sheet, ...	<i>ib.</i>
Notary ought to subscribe each page, ...	614
Witnesses formerly had to sign each page, ...	<i>ib.</i>
Marking of pages unnecessary, ...	<i>ib.</i>
Writer of instrument, ...	<i>ib.</i>
Essentials of docquet, ...	615
Where separate acts of infeftment necessary, ...	<i>ib.</i>
'Respectively and successively,'	<i>ib.</i>
Lands erected into a barony, ...	616
Sasine in favour of assignee, ...	709, 710
Deduction of title, ...	710
Sasine surreptitiously passed, ...	604
Registration, ...	618, <i>et seq.</i>
<i>See Registration for Publication.</i>	
Efficiency of system of registration led to Sasines Act 1845, ...	621
Registration equivalent to delivery of conveyance, ...	104
Modern form of, ...	621, <i>et seq.</i>
Date of registration is now date of sasine, ...	623
Erasures, ...	626
Sasine on Chancery precept, ...	<i>ib.</i>
Unrecorded sasine of no value, ...	1051
In burgage subjects.	

See Resignation and Sasine—Cognition and Sasine.

SASINES PROPRIIS MANIBUS, ...	616, 617
-------------------------------------	----------

	PAGE
SASINES PROPRIIS MANIBUS—continued.	
Not in view of Act of 1845, ...	623
Act of William IV. as to erasures does not apply to, ...	627
SEA—	
Sea-shore, sea-flood, etc., as boundary of lands, ...	560, 561
See <i>Description</i> .	
Fluctuating boundary, ...	566
Rights in sea-shore, ...	566, 567
Sea-ware as part and pertinent of lands, ...	ib.
SEALING—	
Ancient use of seals in authentication of deeds, ...	26, 27
Objection to reliance thereon, in case of private deed, ...	27
Formerly a statutory solemnity, ...	30
Dispensed with in 1584 as to deeds subscribed and agreed to be registered, ...	ib.
Now unnecessary, ...	ib.
Where prescribed by granter himself as a solemnity in authenti- cation of deed, ...	82
Effect of personal obligation by Englishmen under seal, as com- pared with one not under seal, ...	184, 185
SEARCH FOR INCUMBRANCES—	
Obligation as to, in minute of sale, ...	663, <i>et seq.</i>
What burdens are disclosed by search, ...	663
Seller generally bound to give forty years' search, ...	ib.
Registers to be searched, ...	665, <i>et seq.</i>
Where books kept, ...	665
Any one may search, ...	ib.
Purchaser not bound to accept unofficial search, ...	ib.
Search beyond forty years unusual, ...	666
Stipulation that seller shall not furnish search, ...	ib.
Terce and courtesy, ...	669, 670
Servitudes, ...	670
Succession-duty, ...	ib.
Jedge warrants, ...	ib.
Annuities, ...	ib.
Burdens in favour of tenants by local custom or in leases, ...	ib.
Teinds, ...	671
Burdens not disclosed by search, ...	ib.
See <i>Litigiosity</i> .	
Liability of agent omitting to search records, ...	1085
SECURITIES.	See <i>Heritable Securities</i> .
SEDERUNT, ACTS OF.	See <i>Index of Acts of Sederunt</i> .
SELLER—	
Questions between, and purchaser.	See <i>Sale</i> .
SEPTENNIAL LIMITATION.	See <i>Limitation—Cautioner</i> .

SEQUESTRATION—

Under Bankruptcy (Scotland) Act 1856, ...	751, <i>et seq.</i>
May be recalled by Court, ...	751
Petition for, ...	752
Effect of, on property of bankrupt, ...	<i>ib.</i>
Abbreviate must be recorded, ...	<i>ib.</i>
Election of trustee and commissioners, ...	<i>ib.</i>
Act and warrant in favour of trustee, ...	753
Prior inhibition not to affect rights of trustee, ...	754
Superior's rights reserved, ...	<i>ib.</i>
Creditors' heirs, ...	<i>ib.</i>
Creditors of bankrupt's ancestors not prejudiced, ...	<i>ib.</i>
Includes estate falling to bankrupt after its date, ...	755
Completion of trustee's title, ...	755, <i>et seq.</i>
Trustee may convey lands without completing title, ...	<i>ib.</i>
State of bankrupt's title, ...	756
Imperfect securities, ...	757
Trustee's power of sale, ...	<i>ib.</i>
Who may or may not purchase, ...	150, 151, 757
Discharge of bankrupt, ...	758
Exemption of conveyances from stamp-duty, ...	<i>ib.</i>
Sequestration is proof of notour bankruptcy, ...	769
Subscription of affidavit and claim, and mandate to vote, by party who cannot write, ...	44

See *Bankruptcy*.

SERVICE—

Where unnecessary, ...	999
Special mandate required to authorize agent to expedite, ...	420, 1005
Object of, to transmit from dead to living, ...	1018
Necessary to discover last fiar, ...	<i>ib.</i>
Destination to parent in liferent and children in fee, ...	<i>ib.</i>
Service to liferenter transmits nothing, ...	1019
Where institute predeceases testator, ...	1020
Declarator unnecessary, ...	1022
Where testator is institute, ...	1023
Heir of provision in trust-substitutions, ...	1024
Vicennial prescription, ...	1027
Specification of connecting links, ...	1028

SPECIAL SERVICE—

Old form of, ...	1000
Brieve of inquest, ...	<i>ib.</i>
Heads of inquiry and procedure before jury, ...	1001, 1002
Verdict of jury retoured to Chancery, ...	1002
Extract retour given out to heir, ...	<i>ib.</i>
See <i>Chancery Precept</i> .	
Service of Heirs Act, ...	1004
Special service not now employed where ancestor was Crown vassal—general service sufficient, ...	<i>ib.</i>
Petition for special service, ...	1009

	PAGE
SERVICE—continued.	
Warrant to infest contained in decree, ...	1009
Not transmissible by heir, ...	<i>ib.</i>
Infestment of heir necessary before transmitting his right, ...	1010
Decree may now be recorded in Register of Sasines, ...	<i>ib.</i>
Lapsed special service, ...	1025
Special service in burgage lands, ...	1030
In lands acquired by excambion under Montgomery Act, ...	1018
Implied general service, ...	1026
GENERAL SERVICE.	
Necessary when ancestor had personal right, ...	1010
Old form of procedure, ...	1004
Where ancestor infest as Crown vassal, ...	<i>ib.</i>
Petition for, may be to sheriff of deceased's domicile or of Chancery, ...	<i>ib.</i>
If domicile cannot be proved, ...	<i>ib.</i>
<i>Inducie</i> , ...	1005
Evidence led before provost or bailies of royal burgh, or special commissioner, ...	<i>ib.</i>
Appeal to Court, if Sheriff refuses to serve, ...	<i>ib.</i>
Decree of service, ...	1006
<i>See Chancery Precept.</i>	
To bond secluding executors, ...	240
To real burden, ...	1063
To ground-annual, ...	1067
General service in one character will not transmit rights held by ancestor destined to heirs of a different character, ...	1014
Service ought to be in the proper character, ...	<i>ib.</i>
Liability incurred by service as heir of provision, ...	1015
Service as heir-male general carries all rights so destined, ...	<i>ib.</i>
Deeds containing destination must be specified, ...	<i>ib.</i>
Service under entail, ...	<i>ib.</i>
Reference to conditions and destination, when entail recorded in Register of Entails or feudalized, ...	1016, 1017
Where entail not recorded or feudalized, ...	1017
New entails, ...	<i>ib.</i>
Necessity for service distinguishes institute from substitute heir, ...	790
Birth of nearer heir of tailzie after service, ...	1024
Remoter heir must denude, ...	1025
<i>Bona fide</i> contractions with remoter heir stand good, ...	<i>ib.</i>
Right of nearest heir for the time indefeasible, if served in virtue of destination of law, ...	<i>ib.</i>
Competing services, ...	1026
Liability incurred by service, ...	1027
Service <i>cum beneficio inventarii</i> , ...	<i>ib.</i>
General service with specification annexed, ...	<i>ib.</i>
SERVICES, PERSONAL—	
Abolished, ...	538
Money compensation substituted therefor, ...	590

INDEX.

1227

PAGE

SERVITUDES—

How far clause of absolute warrandice extends to, ...	206
Acquisition of, by possession, ...	562

SEXENNIAL PRESCRIPTION—

Of bills of exchange, ...	477, <i>et seq.</i>
---------------------------------	---------------------

SHAREHOLDER—

Liability of, for debts of joint-stock company, ...	405
Right of substituting new members by sale of shares, etc., .	<i>ib.</i>
May object to misapplication of funds, ...	<i>ib.</i>
<i>See Calls—Joint-Stock Company.</i>	

SHERIFF OF CHANCERY, ...	1004, <i>et seq.</i>
--------------------------------	----------------------

SHETLAND.	<i>See Orkney and Shetland.</i>
-------------------	---------------------------------

SHIP—

Property in, divided into sixty-four shares, ...	412
Registration of owners, ...	413
No trusts noticed in register, ...	<i>ib.</i>
Certificate of registry, ...	<i>ib.</i>
Bill of sale, ...	<i>ib.</i>
Authentication of bill of sale and mortgage over ship, .	92
Exemptions from stamp-duty, ...	195
Ship sold when at sea, ...	414
Transfer on owner's marriage, bankruptcy, or death, .	415
Certificate of sale, ...	<i>ib.</i>
Cancellation of certificate, ...	<i>ib.</i>
In what cases poindable, ...	514
Usually attached by arrestment, ...	<i>ib.</i>
Arrestment of ships or shares in ships, ...	519
Mode of executing arrestments, ...	<i>ib.</i>
May be arrested for debt by one who is only part-owner, .	<i>ib.</i>

See Mortgage—Maritime Writs.

SHOOTINGS—

Rent of, let or unlet, taken into account in fixing amount of	
Aberdeen Act Annuity, ...	804
Lease of, not good against singular successor, ...	1114

SIGNATURES IN EXCHEQUER—

Presenter of, ...	704
-------------------------	-----

SIGNING.	<i>See Subscription.</i>
------------------	--------------------------

SILVER—

Silver and gold mines <i>inter regalia</i> , ...	568, 569
--	----------

SIMONY—

Simoniacal contracts void, ...	144
Obligations connected with presentations to churches, .	<i>ib.</i>
In reference to augmentations, ...	<i>ib.</i>
As to office of parish schoolmaster, ...	<i>ib.</i>
As to presentation to bursary, ...	<i>ib.</i>

	PAGE
<i>SINE QUO NON</i> —	
Trustee, ...	878
Widow may be trustee <i>sine quâ non</i> , ...	126
Executor, ...	865
Factor, ...	420
<i>SINGLE AVAIL</i> —	
Of marriage, ...	530
<i>SINGLE ESCHEAT</i> , ...	507
<i>SINGULAR SUCCESSOR</i> —	
Enforcement of conditions of feu against, ...	573, <i>et seq.</i>
See <i>Conditions</i> .	
Composition payable by, ...	584, 1056-1059
In superiority, ...	587, 659, 687
Taxed entry, ...	592
Blench holdings, ...	593
Assignees before infeftment, ...	1058, 1059
Trustee entering for behoof of heir, ...	1055
See <i>Composition</i> .	
<i>SKELETON BILL</i> , ...	434, 435
<i>SMUGGLING</i> —	
Contracts relative to, unlawful, ...	145
Foreigner accessory to smuggling, ...	<i>ib.</i>
Assignee to debt incurred to foreigner, ...	<i>ib.</i>
Contracts made abroad for sale of smuggled goods, ...	<i>ib.</i>
Distinction between prohibited goods and goods not prohibited, ...	146
Bill for price of contraband goods, ...	<i>ib.</i>
<i>SOCAGE, TENURE OF</i> , ...	534
<i>SOLEMNITIES OF EXECUTION OF DEEDS</i> —	
Objects and necessity of, ...	23
Ancient modes of authentication, ...	24
Among Jews, Romans, Saxons, Normans, and English, ...	25
Ancient Scottish forms of authenticating Crown charters, ...	26
Private deeds, ...	27
Sealing, ...	<i>ib.</i>
Commencement of system now in use, ...	28
Provisions of Act of 1540 as to subscription, ...	<i>ib.</i>
Subscription of witnesses, ...	29
Provisions of Act of 1579, ...	<i>ib.</i>
Sealing dispensed with as solemnity in deeds subscribed and agreed to be registered, ...	30
Sealing now unnecessary, ...	<i>ib.</i>
Practice of allowing condescendence, ...	<i>ib.</i>
Provision of Act of 1593 as to name and designation of writer, ...	31
Provisions of Act of 1681 as to writer and witnesses, ...	32
Authority to write deeds bookwise by Act of 1696, ...	<i>ib.</i>
Provisions of that Act as to numbering pages, signing each page, etc., ...	<i>ib.</i>

INDEX.

1229

PAGE

SOLEMNITIES OF EXECUTION OF DEEDS—*continued.*

Marking number of pages now dispensed with, ...	33
English form of execution, ...	185
Special cases where statutory solemnities dispensed with, ...	78, <i>et seq.</i>
Additional solemnity prescribed by party in reference to his own will, ...	82
See <i>Sealing—Subscription—Notary—Blind Persons—Witnesses—Testing-Clause.</i>	

SPECIAL STATUTORY FORMS OF AUTHENTICATION, ...	91-93
Crown Private Estates Act, 1862, ...	91
Companies Act, 1862, ...	92
Merchant Shipping Act, 1854, ...	<i>ib.</i>
Acts of incorporation of railway and joint-stock companies—as to transfers of stock, ...	<i>ib.</i>

SOVEREIGN—

Superscription of deeds by, ...	86
Source of all feudal rights, ...	527, 532

SPECIAL—

Factory, ...	419
Submission, ...	351
Charge, ...	762
Adjudication, ...	1095
Legacy, ...	910
Service, ...	1000

See *Service.*

SPECIALTY DEBT, ...	395
---------------------------	-----

SPE^S SUCCESSIONIS—

Children's right under marriage-contract, ...	831
Cannot be adjudged, ...	149

STAMP-DUTIES—

Object of stamp laws, ...	188
Deeds not admissible in evidence until stamped, ...	<i>ib.</i>
Adjudication stamp, ...	189
Different classes of duties, ...	<i>ib.</i>
Deeds liable according to real nature of transaction, ...	190
Deeds falling under general title of 'conveyance,'	<i>ib.</i>
Bond of annuity, ...	<i>ib.</i>
Deed of sale, where part of the price remains debt of purchaser, 190, 191	
Where several obligations, but only one transaction, ...	191
Separate obligations in one deed, ...	<i>ib.</i>
Contract of marriage, ...	<i>ib.</i>
Precepts of sasine, ...	192
Tenant's consent to remove without warning, ...	<i>ib.</i>
Settlements, ...	<i>ib.</i>
Exemptions from settlement duty, ...	193
Submission and decree-arbitral, ...	<i>ib.</i>

	PAGE
STAMP-DUTIES— <i>continued.</i>	
'Deed' stamp, ...	193
'Deed' as distinguished from 'will,'	<i>ib.</i>
Denominational stamps, ...	<i>ib.</i>
Progressive duties, ...	194
Receipts, ...	<i>ib.</i>
Banker paying on unstamped order cannot recover from debtor's cautioners, ...	<i>ib.</i>
Objections to deeds as not written on proper stamp, ...	195
Parties to a cause cannot waive the objection, ...	196
Unstamped instruments admitted as evidence in criminal pro- ceedings, ...	198
Or as evidence of a fact, ...	<i>ib.</i>
Tenor of unstamped deed cannot be proved, ...	199
In feu-charter, imposed in respect of feu-duty as well as price, ...	192, 604
Writs of confirmation and resignation, ...	193, 700
Inventory of personal estate, ...	1038, 1035
Additional inventory, ...	1040
Ground-annual right, ...	192, 1067
Assignment of securities, ...	1087
Foreign bills drawn in sets, ...	431
Instrument of protest of bill, ...	468
Bank-draft, ...	194, 489
Promissory-note, ...	194
Articles of association, ...	394
Indenture of apprentice, ...	345
Inventory of writs relative to disposition, ...	644
Notarial instruments, ...	194
EXEMPTIONS FROM DUTY.	
I O U, ...	195
Deeds for sale or transfer of ships, ...	195, 417
Dispositions <i>omnium bonorum</i> , ...	<i>ib.</i>
Conveyances relating to bankrupt's estate, ...	195, 758
Appraisements for legacy duty, ...	195
<i>Mortis causâ</i> deeds, by 23 & 24 Vict. cap. 15, ...	867
Act not retrospective, ...	193
Receipts for money sent by constituent to factor to be placed to his account, ...	194
Inventory of personal estate of soldier, etc., dying in service, ...	1040
Transfer of railway mortgages by endorsement, ...	288
AFTER-STAMPING.	
With or without penalties, ...	196
Provision for preventing evasion of duty by omitting to specify consideration, ...	196
Exceptions as to bills, notes, drafts, or orders, ...	197
Policies for sea-insurance, ...	<i>ib.</i>
Agreements, ...	<i>ib.</i>
Receipts and discharges, ...	<i>ib.</i>

INDEX.

1231

PAGE

STAMP-DUTIES—*continued.*

Bill of lading and charter-party, ...	198
Indenture of law apprentice, ...	<i>ib.</i>
Proxy, ...	<i>ib.</i>
Effect of after-stamping, ...	<i>ib.</i>
Who is liable to pay for getting deed stamped?	199

STIPEND—

Assignment of, in security, ...	316
Completed by intimation to heritors, ...	317
Obligation of relief from augmentations, ...	588
<i>See Relief.</i>	

SUBINFEUDATION—

Prohibition against, ...	578, 579, 580
Entry of vassal's disponees, ...	580
Prohibition not meant to strike at conveyances with alternative holding, ...	<i>ib.</i>
But vassal ought to enter with superior when prohibition accompanied by irritancy or made real, ...	580, 581
<i>See Conditions.</i>	
Provisions of Titles Act 1860, when purchaser enters with superior within twelve months after date of conveyance, ...	641

SUB-LEASE.

See Lease.

SUBMISSION—

Contract of, ...	348, <i>et seq.</i>
If of importance, can be proved only by writ, ...	349
Verbal, ...	<i>ib.</i>
By company, ...	350
By agent or factor, ...	<i>ib.</i>
General or special, ...	351
Both general and special, ...	352
Arbiters must be named, ...	<i>ib.</i>
Not enough to appoint holder of an office, ...	353
Exceptions from rule requiring arbiters to be named, ...	<i>ib.</i>
Not necessary to name arbiter in contract containing agreement to refer, ...	354
Powers and duties of arbiters, ...	355
Provision against loss of proof, ...	358
Obligation to implement award, ...	<i>ib.</i>
Power to issue interim decree, ...	360
Falls by death of party, of arbiter, or of oversman, ...	362
Endurance of, when part of an agreement or lease, ...	362, 364
By tutor, ...	362
Bankruptcy of party does not terminate, ...	363
Action of reduction of, ...	<i>ib.</i>
Provision that submission shall not fall by death of party, ...	<i>ib.</i>
Endures for year and day, ...	<i>ib.</i>
Homologation when submission not prorogated, ...	364

See Prorogation.

	PAGE
SUBMISSION— <i>continued.</i>	
Clause of registration, ...	36 ^a
Stamp-duty, ...	193
In missives of sale, ...	674
In articles of roup, ...	679
Power to submit in trust-deed, ...	892
<i>See Arbitration—Oversman—Decree Arbitral.</i>	
SUBSCRIPTION—	
Provisions of Act of 1540, ...	28
Provisions of Act of 1579 as to subscription by parties or two notaries before witnesses, ...	29, 30
Provision of Act of 1681 requiring subscription of witnesses, ...	32
Provisions of Act of 1696 as to deeds written bookwise, ...	<i>ib.</i>
By or on behalf of parties who can write, ...	34, <i>et seq.</i>
Deeds written bookwise, consisting of one or more sheets, ...	34, 35
Where last page only subscribed, ...	<i>ib.</i>
On first page ineffectual, ...	35
Should be below the whole deed, ...	<i>ib.</i>
Sidescribing deeds written in form of roll, ...	<i>ib.</i>
Ancient mode of subscription, ...	36
Regulated by Act of 1672, ...	<i>ib.</i>
Sovereign, royal family, peers, peeresses, and bishops, ...	<i>ib.</i>
Other parties, ...	<i>ib.</i>
Notaries, ...	<i>ib.</i>
Heirs of entail, ...	<i>ib.</i>
Married women, ...	<i>ib.</i>
Must be without assistance, ...	37
Where party cannot write, ...	38, <i>et seq.</i>
<i>See Notary.</i>	
By blind persons, ...	44, 45
By initials, ...	46.
<i>See Initials.</i>	
Signing by a mark, ...	<i>ib.</i>
<i>See Mark.</i>	
SUBSTITUTE—	
Meaning of term, ...	789
'Whom failing' not necessary, ...	790
Infetment of institute exhausts precept, and substitute must serve, ...	1024
Necessity for service distinguishes institute from, ...	790
Blank in name of, ...	228
Substitutions in grants of legacies, ...	791, 922
In bond of provision, ...	857, 858
Special trust for substitutes, ...	923
Heir of entail, ...	950
Right of substitute named in personal bond vests without con- firmation, ...	1050
Substitution of payees renders bill null, ...	442
<i>See Service—Institute.</i>	

INDEX.

1233

PAGE

SUB-TENANT.

See *Lease*.

SUCCESSION DUTY—

Discharge of, as a burden on land, ...	670
Succession Duty Act, ...	889

SUCCESSION, INTESTATE—

Rights of husband, wife, and children, ...	792, <i>et seq.</i>
Of collaterals and ascendants, ...	860, <i>et seq.</i>
Where part of a succession turns out to be intestate, succession held to have opened as at death of testator, ...	888

SUMMARY DILIGENCE—

On bills of exchange, ...	469
Not competent where bill signed by one notary, ...	432
Nor on bill signed by initials, ...	433
Nor by a mark, ...	434
Is summary diligence competent on bill holograph of drawer, but not signed by him?	435
On bill signed by procuration, ...	436, 437
On bill payable by instalments, ...	441
Incompetent on bill without date, ...	443
By husband on bill payable to wife before marriage, ...	450
On protest in English form, ...	471
On foreign bill, ...	<i>ib.</i>
Incompetent to raise summary diligence for debt after expiry of six years, ...	486
On bank-draft, ...	489
Incompetent on extract decree arbitral, without deed containing consent to registration, ...	371

See *Registration for Execution*.

SUNDAY—

Execution of private deeds on, ...	61
Judicial acts and diligence, ...	<i>ib.</i>
<i>Meditatio fugæ</i> warrants, ...	<i>ib.</i>
Bill drawn on, ...	444
Accepted on, ...	<i>ib.</i>
Where last day of grace is a Sunday, ...	460, 478
Apprentice not bound to work on, ...	346

SUPERIOR AND VASSAL—

Rights of, ...	527, <i>et seq.</i>
Where feuar's right personal, ...	577
Where conditions of feu contravened, ...	578
Payment of entry-money at stated intervals or on changes of ownership, ...	580, 581
Limitations of superior's rights, ...	582, <i>et seq.</i>
Obligations inherent in feu-right need not be expressly renewed, ...	588
Superior's claim for payment of feu-duty, ...	591

	PAGE
SUPERIOR AND VASSAL—continued.	
Superior not liable in assessment for building parish church,	599
Nor for ordinary parish burdens,	<i>ib.</i>
Now bound to grant charter of confirmation,	684
Title to superiority ought to be completed before entry granted to vassal,	689, 1051
Title validated by accretion,	<i>ib.</i>
Superior must have title <i>ex facie</i> valid,	689, 1052
Vassal may not scrutinize warrants of superior's title,	689
Interjection of superiors,	700
Multiplication of superiors,	701
Conveyance to two parties <i>pro indiviso</i> is not multiplication,	1052
Old forms of sopiting rights of superiority,	731, 732
Tinsel of superiority,	732
Forfeiture under Lands Transference Act,	<i>ib.</i>
Petition to have forfeiture declared, where <i>reddendo</i> does not exceed £5,	<i>ib.</i>
Where <i>reddendo</i> exceeds £5,	733
Entry from Crown or Prince <i>in vice</i> of unentered superior,	<i>ib.</i>
Relinquishment of superiority by minute,	734
Acceptance of relinquishment,	<i>ib.</i>
Forfeiture or relinquishment by apparent heir,	<i>ib.</i>
Where superiority entailed,	734, 735
Deed of relinquishment and writ of investiture under Titles Acts,	735
Superior's rights not affected by sequestration of vassal under Bankrupt Act,	754
See <i>Entry of Vassals—Charter—Feu.</i>	
SUPERIORITY—	
Casualties of,	582, <i>et seq.</i>
Disposition of,	700
Ought to contain alternative holding,	700, 701
Where superior's title is to 'superiority and feu-duties,' not to 'the lands,'	702
Security over superiority ought to convey the lands,	1069
Title to claim enrolment as freeholder,	702
Delivery of disposition to vassal implies discharge of bygone feu-duties,	703
Separation of property and superiority in making up title,	693, <i>et seq.</i>
Not affected by terce,	796
See <i>Superior and Vassal—Consolidation.</i>	
SURVIVORSHIP—	
Clause of, in trust-disposition and settlement,	878
SUSPENSION OF CHARGE—	
Summary procedure against cautioner in,	268
Cautioner not entitled to withdraw,	271
Bond of caution in suspension carried by assignation of bond charged on,	287

INDEX.	1235
SYMBOLS—	PAGE
In giving sasine, ...	611
<i>See Delivery of Sasine.</i>	
In cognition and sasine, ...	1080
TACITURNITY—	
Discharge of debts by, ...	321
Pleadable before lapse of prescriptive period, ...	<i>ib.</i>
Cases in which plea sustained and repelled, ...	337
TACK.	<i>See Lease.</i>
TAXED ENTRY.	<i>See Composition.</i>
TAXED WARD, ...	529
TEINDS, ...	671
Valuation of, ...	<i>ib.</i>
Bishops' teinds, ...	<i>ib.</i>
With heritable right, ...	<i>ib.</i>
Free teind, ...	<i>ib.</i>
Do not pass as part and pertinent, ...	569
Division of <i>cumulo</i> feu-duty, where feued along with lands, ...	589
Symbols of infestment, ...	611
Separate act of infestment necessary, ...	615
Intending purchaser ought to examine state of, ...	671
Tack of, ...	305
Assignation of tack to proprietor, ...	<i>ib.</i>
Terce not due out of, unless infestment in them by erection, ...	796
Deduction for, in estimating composition, ...	1058
TENANT—	
Rights of, in questions with purchaser, ...	645
<i>See Lease.</i>	
TENENDAS, CLAUSE OF, ...	589
Points out superior and manner of holding, ...	<i>ib.</i>
Enumeration of accessories now dispensed with, ...	<i>ib.</i>
Controlled by dispositive clause, ...	590
TENOR.	<i>See Proving the Tenor.</i>
TERCE, ...	795
Husband's sasine is measure of, ...	<i>ib.</i>
Excluded as to lands held on personal title, ...	<i>ib.</i>
Where fee only nominal, ...	<i>ib.</i>
Where absolute disposition by husband intended only as security, ...	<i>ib.</i>
Does not arise if marriage dissolved within year and day without living child, ...	<i>ib.</i>
Service and keuning to, ...	<i>ib.</i>
Competition between widow and heir or disponee of husband, ...	<i>ib.</i>
Can heirs of widow claim arrears from singular successor?	796
Due out of real securities, ...	<i>ib.</i>
Is terce due out of burdens by reservation?	<i>ib.</i>

	PAGE
TERCE—continued.	
Due out of burgage lands, ...	796
Does not affect superiorities, leases, coal, or teinds, unless infeftment in them by erection, ...	<i>ib.</i>
Excluded by special provision to wife, ...	812
Special provision in lieu of terce does not exclude <i>jus relictæ</i> , ...	<i>ib.</i>
Discharge of, as a burden on lands, ...	669, 670
TERM—	
Term of entry in feu-charter, ...	589
In disposition, ...	635
Legal and conventional terms, ...	594, <i>et seq.</i>
Term of payment of price of lands sold, ...	673
Arrestment on term day, ...	520
TESTAMENT—	
Nomination of executor, ...	863
Where testator gives no directions to executor, ...	<i>ib.</i>
Where no executor named, or executor does not accept, ...	865
Does not carry heritage, ...	866
Exempt from stamp-duty, ...	867
Lands cannot be burdened by a simple testament, ...	869
But a clause creating a burden on lands can be incorporated with a testament, ...	<i>ib.</i>
Heir-at-law cannot be burdened by testament, but stranger disponent can, ...	<i>ib.</i>
Exercise on deathbed of reserved power to burden, ...	903
Doctrine of approbate and reprobate, ...	870
Special assignation of particular effects supersedes confirmation, ...	<i>ib.</i>
But does not save stamp or succession duties, ...	<i>ib.</i>
Conveyance of whole moveable estate will carry moveables wherever situated, ...	873
Revocation of. See <i>Revocation</i> .	
Notarial execution of, ...	38, 39, 904
Parish minister may act as notary, ...	39
Is execution by one notary before two witnesses sufficient where sum exceeds £100 Scots?	<i>ib.</i>
Testament attested by legatee and executor, ...	48
Pupil cannot make testament, ...	904
Minors and married women can, without consents, ...	<i>ib.</i>
Nuncupative or verbal testament, ...	78
TESTAMENT TESTAMENTAR OR DATIVE, ...	1035
TESTAMENTARY WRITINGS, ...	860, <i>et seq.</i>
Effect of instructions to prepare settlement, ...	905
Verbal directions of no effect, ...	78
Exemption from stamp-duty, ...	867
Testator's appointments must be agreeable to law, ...	908
Alterations on testamentary writings, ...	66-68
Authentication of, ...	903, 904

INDEX.

1237

TESTAMENTARY WRITINGS—*continued.*

PAGE

Privileges as regards authentication, ...	78
Do not require delivery during granter's life, ...	101

TESTING-CLAUSE—

Particulars to be stated in, ...	221
Statement as to erasures, marginal additions, etc., ...	<i>ib.</i>
Practice as to completion of, ...	222
On delivery of deed <i>inter vivos</i> , grantee may get clause completed, <i>ib.</i>	
Correction of errors in, ...	223
Right to add testing-clause to a deed, ...	<i>ib.</i>
Alterations incompetent after deed made subject of an interlocutor, <i>ib.</i>	
Or registered for preservation or execution, ...	<i>ib.</i>
Provisions of Titles Acts when deeds partly printed or engraved, <i>ib.</i>	
Foreign matter should be excluded, ...	224
But not inadmissible, ...	224, 225
May contain designation of granter of deed, ...	201

THELUSSON ACT—

Provisions of, now extend to Scotland as regards heritable as well as moveable property, ...	989
--	-----

TICKET—

Form of, ...	232
Passed by delivery after blank indorsation, ...	<i>ib.</i>
Transfer of, by delivery, struck at by 1696, cap. 25, ...	<i>ib.</i>

TINSEL OF SUPERIORITY, ... 732

TITLE—

Where unnecessary, ...	999
Real title, personal title, ...	<i>ib.</i>
Progress of titles, ...	653, <i>et seq.</i>
<i>See Completion of Title—Prescription—Sale—Searches.</i>	

TOWN-CLERK—

May infest himself in burgage lands, ...	608, 739, 740
Rights of, as to preparing instruments of sasine under Titles Act of 1860, ...	739, <i>et seq.</i>
Has no right to prepare notarial instruments under Acts of 1845, 1858, or 1860, ...	741
Rights of town clerks appointed before 8th March 1860, ...	742, 743
Where no burgh register of sasines is kept, ...	<i>ib.</i>

TRANSFER—

Of property of company incorporated under Act of 1862, ...	404
Authentication of transfer of stock of railway and joint-stock companies, ...	92, 93
Of railway mortgages by endorsement, ...	287, 288
By executors of deceased member of joint-stock company, ...	399

TRANSLATION—

By assignee of original creditor, ...	318
Old and modern forms, ...	<i>ib.</i>
Completed by intimation, ...	319

	PAGE
TRIENNIAL—	
Prescription of accounts, etc., may be elided by reference to debtor's oath, ...	337
TROUT FISHING—	
Passes as part and pertinent, ...	565
TRUST—	
Marriage trust for settlement of wife's property on herself and children, ...	844
Trust for liferenter and fiar in personal bond, ...	252
Trust for parent in liferent, and children in fee, ...	783
Trust and security for payment of children's provisions, ...	834, <i>et seq.</i>
Gives children <i>jus crediti</i> and preference, ...	<i>ib.</i>
Trusts connected with entails, ...	974, <i>et seq.</i>
Latent trust, ...	167
Probative writing not necessary to prove trust under Act of 1695, ...	1079
Trust substitutions, ...	1024
Service as heir of provision in trust, ...	<i>ib.</i>
TRUST FOR CREDITORS—	
Objects of, ...	744
Clauses of trust-disposition, ...	745
Provision for appointment of successors to original trustees, ...	<i>ib.</i>
Purposes of trust, ...	746
Preferable debts, ...	<i>ib.</i>
Deed of accession by creditors, ...	749
Trustees accountable to creditors, ...	<i>ib.</i>
Liable as vassals, ...	750
Can sue declarator of non-entry, ...	<i>ib.</i>
Effect of trust on creditors' succession, ...	<i>ib.</i>
Debts due on personal bond remain moveable, ...	<i>ib.</i>
Creditors' right attachable by arrestment, ...	<i>ib.</i>
Debts may be made heritable, ...	<i>ib.</i>
Stamp-duty, ...	<i>ib.</i>
Acceding creditors cannot take separate measures, ...	750, 751
Winding up, ...	751
Trust creates burden on truster's right, radical right remaining in him, ...	751, 812
TRUST-BOND AND ADJUDICATION—	
When resorted to, ...	1028
Gives feudal title to heir, ...	1029
Incompetent where service already exped by another party, ...	<i>ib.</i>
TRUST-DISPOSITION AND SETTLEMENT—	
Uses and objects of, ...	874
Clauses, ...	876, <i>et seq.</i>
Number of trustees, ...	876
Trustees afterwards named by truster, ...	877
<i>Sine quo non</i> , ...	878

· TRUST-DISPOSITION AND SETTLEMENT—*continued.*

PAGE

Survivorship clause, ...	878
Extends to trustees named by codicil, ...	<i>ib.</i>
Survivors need no service, ...	1024
Quorum, ...	879
Gratuitous trustees, ...	<i>ib.</i>
Majority now quorum by law, ...	879, 880
Power to two or one to act, ...	880
Interpretation clause, ...	881
Destination to assignees, ...	<i>ib.</i>
Precept to trustees can be assigned, ...	<i>ib.</i>
Description of subjects conveyed, ...	881, 882
PURPOSES OF TRUST—	
To pay expenses, ...	882
Division of expenses between liferenter and fiar, ...	<i>ib.</i>
To pay debts, ...	<i>ib.</i>
Preferences among creditors, ...	883
Disposal of residue, ...	<i>ib.</i>
Deed of directions, ...	<i>ib.</i>
Directions may be executed on deathbed, ...	883, 903
Mode of securing annuities, ...	884
POWERS OF TRUSTEES—	
Power of assumption, ...	885
May be exercised by trustee on deathbed, ...	<i>ib.</i>
Additional trustees named by beneficiary, ...	886
Power to trustees to name their own successors, ...	<i>ib.</i>
Infeftment of assumed trustees will not accresce to and validate charter by prior trustees not infeft, ...	689
Power to resign, ...	886
Trustees entitled to obtain feudal right, though trust-deed under challenge by truster's heir, ...	887
Power to sell trust-estate, ...	<i>ib.</i>
Where implied, ...	<i>ib.</i>
Trustee cannot purchase, ...	149
Trustees must not go beyond powers in deed, ...	891
Claims of Inland Revenue to legacy-duty, where trustees directed to sell, ...	888
Discretionary power to sell, ...	889
Right of succession on part of heirs of beneficiary, ...	<i>ib.</i>
Whether heir in heritage or next-of-kin succeeds, ...	<i>ib.</i>
Power to borrow, ...	890
Cannot be conferred by Court, ...	<i>ib.</i>
Power to grant feus, leases, etc., ...	891
Investment of funds, ...	<i>ib.</i>
Funds ought not to be lent to trustees themselves, ...	891, 896
Arrestment of trust-funds by trustee, ...	519
Rights of beneficiary when trust-funds, under administration of partner of company, employed for company's behoof, ...	387
Trustees must exercise powers in manner directed by the deed, ...	891

	PAGE
TRUST-DISPOSITION AND SETTLEMENT—<i>continued.</i>	
Power to purchase 'lands,'	892
Does not include feu-duties, ...	<i>ib.</i>
Power to refer, etc., ought to be expressed, ...	<i>ib.</i>
Appointment of factor, ...	<i>ib.</i>
Trustee acting as factor, ...	425
Interest due to or by trustee acting as factor, ...	246
Liability to make up accounts annually, and pay interest on accumulations, ...	<i>ib.</i>
Appointment of law agent, ...	893
Remuneration of factor and law agent, ...	<i>ib.</i>
Trustees not entitled to make profit by agency, ...	154
Unless they have power to name one of themselves agent, ...	155
Clauses of indemnity to trustees, ...	<i>ib.</i>
Not now necessary, ...	894
Liabilities of trustees, ...	<i>ib.</i>
For investments, ...	398, 399, 894
For expenses, ...	895
For factors, ...	896
Intrusions, ...	<i>ib.</i>
Trustees named executors, tutors, and curators, ...	897
Liabilities of tutors and curators, ...	<i>ib.</i>
Revocation of prior deeds. See <i>Revocation.</i>	
Acceptance or declinature by trustees, ...	906
Legacy to non-accepting trustee, ...	916
Resignation of trust, ...	906
Trustees appointed by Court, ...	907
Must find caution, ...	<i>ib.</i>
Judicial factor on trust-estate, ...	<i>ib.</i>
Under Bankrupt Act, ...	908
<i>See Judicial Factor.</i>	
Beneficiary's right transmissible by assignation, ...	923
Intimated to trustees, ...	924
Arrestment of beneficiary's right, ...	<i>ib.</i>
Where trustees hold particular heritable subject for beneficiary, adjudication or inhibition is proper diligence, ...	<i>ib.</i>
Litigiousity, ...	<i>ib.</i>
Discharge by legatee,—residuary legatee, ...	<i>ib.</i>
<i>See Legacies.</i>	
Completion of trustee's title, ...	925
Entry with superior, ...	1056
Termination of trust, ...	931
Separate agents for trustees and beneficiary, ...	932
Declaratory adjudication by beneficiary, ...	<i>ib.</i>
Trust-dispensee cannot act as notary for testator, ...	43
Trustee witness to trust-deed, ...	48
TRUSTEE—	
Cannot buy lands which he is selling, ...	149

INDEX.

1241

PAGE

TRUSTEE—*continued.*

Nor purchase claims against trust-estate, . . . 150

See *Trust-Disposition and Settlement.*

In sequestration, . . . 752, *et seq.*

May not purchase bankrupt's estate, . . . 150, 757

See *Sequestration.*

TUTOR—

Father is tutor *ex lege*, . . . 108

Tutor-nominate, tutor-at-law, tutor-dative, . . . *ib.*

Objection to tutor not resident in Scotland, . . . *ib.*

In what cases tutors are required to find caution, . . . 109

Septennial limitation inapplicable to bond of caution, . . . 263

Powers of, . . . 110

Can grant such deeds as pupil might be compelled to grant, . . . *ib.*

Application to Court for enlarged powers, . . . 111, 116

Sale of portion of pupil's expected inheritance, . . . 149

Office of tutor gratuitous, . . . 113

Bound to denude in favour of ward, . . . *ib.*

Powers expire with office, . . . *ib.*

Discharge granted after expiry of office invalid, . . . 329

Statutory powers and immunities in favour of, . . . 120

Calling and citation of tutors in actions against pupil, . . . 114

Objection that tutor cannot be *auctor in rem suam* not pleadable

by third parties, . . . 115

Submission by tutor falls on his death, . . . 362

Bound to accumulate interest, . . . 246

Several liability of tutors, . . . 249

Liability of trustees named tutors, . . . 897

See *Pupil—Pupils Protection Act.*

TUTOR AD LITEM—

Appointed by Court, . . . 108, 114

Entitled to remuneration, . . . 155

Effect of consent by, under Entail Amendment Act, . . . 972

UDAL TENURE,

582

ULTIMA HÆRES,

550

UNION—

Clause of, . . . 616

Charter of, . . . 552

UNIVERSAL LEGACY,

909

UNLAWFUL CONTRACTS—

Will not be enforced by the Court, . . . 136

Obligations *contra bonos mores*, . . . 136, 137

Legacy *ob turpem causam*, . . . 7

Restraints on marriage, . . . *ib.*

Marriage brokerage contracts, . . . 138

Interference with domestic relations, . . . 138, 139

Restraints on liberty of person or privileges of subject, . . . 140

	PAGE
UNLAWFUL CONTRACTS—continued.	
Restraints upon carrying on trade, ...	140
Interference with freedom of election, ...	<i>ib.</i>
Bribery at elections, ...	141
Buying and selling offices of public trust, ...	<i>ib.</i>
Transactions as to emoluments of office, ...	141, 142
Provision of Bankrupt Act as to part of bankrupt's salary payable to trustee for his creditors, ...	143
Pension of clerk of deceased Lord of Session, ...	<i>ib.</i>
Simoniactal contracts, ...	144
Stipulations in opposition to Revenue Laws, ...	145
Deduction of Income-tax, ...	<i>ib.</i>
Contraband of trade, ...	<i>ib.</i>
<i>See Smuggling.</i>	
Gaming, ...	146, 147
Wagers, ...	147, 148
Usury, ...	148
<i>See Pactum de Hæreditate Viventis.</i>	
Purchase by agents, trustees, factors, directors, heritable creditors, etc., ...	149, 151
Buying subject of depending process, to whom prohibited, ...	151
Purchasers deprived of office, ...	<i>ib.</i>
But sales not annulled, ...	<i>ib.</i>
<i>Pactum de quotâ litis</i> unlawful, ...	152
But not if made after lawsuit concluded, ...	<i>ib.</i>
Nor if made by a mercantile house, ...	<i>ib.</i>
<i>See Law Agent.</i>	
USANCE—	
Bill payable at usance, ...	432
USURY LAWS—	
Abolished in 1854, ...	148, 242
But Act not retrospective, ...	148
VASSAL—	
Rights of superior and, ...	527, <i>et seq.</i>
Vassal's estate— <i>dominium utile</i> —extends <i>a cælo ad centrum</i> , ...	528, 571
Cannot refute feu, ...	591
<i>See Charter—Superior and Vassal—Feu.</i>	
VERBAL—	
Agreement to sell lands, ...	647
Agreement validated by <i>rei interventus</i> , ...	185, 186
Legacy, ...	915, 916
Submission, ...	349
Lease, ...	1113
Testament, how far effectual, ...	78
Verbal directions to make will of no effect, ...	<i>ib.</i>
VESTING—	
Of marriage-contract provisions to children out of entailed estate during father's life, ...	827

INDEX.

1243

PAGE

VESTING—*continued.*

Of legacies, ... 916, *et seq.*

See *Legacies.*

VITIATIONS—

Re-execution of deed partly re-written with alterations, ...	50
Authentication of alterations, ...	62
Proof required that alterations made before execution, ...	<i>ib.</i>
Mode of authenticating erasures, deletions, interlineations, ...	63
Notice in testing-clause, ...	<i>ib.</i>
Simultaneous execution of duplicates, ...	64
Alterations in testing-clause, ...	65
Evidence of writer and witnesses that alterations made at or	
before subscription not admissible, ...	65, 66
Effect of alterations unauthenticated, ...	66
Clerical errors, ...	<i>ib.</i>
Interlineations, ...	<i>ib.</i>
Alterations in testamentary writings, ...	66, <i>et seq.</i>
Vitiations in holograph writings made after delivery, ...	68, 69
Presumption or suspicion of fraud, ...	<i>ib.</i>
Not necessary to establish fraud if alterations in <i>substantialibus</i> , ...	69
Authentication of marginal additions, ...	70
In Register of Sasines, ...	624
In inhibitions, ...	1094
In bank drafts, ...	490
In arrestments, ...	518
In interlocutors, ...	94

WADSET—

Money consigned for redemption of, not arrestable by creditor of	
consigner, ...	519
But can be arrested when wadset declared at an end, ...	<i>ib.</i>

WAGERS—

Not actionable, ...	147
Act of 1845 as to, ...	147, 148

WAGES—

How far arrestable, ...	520
-------------------------------	-----

WARD—

Casualty of, ...	529
Taxed ward, ...	<i>ib.</i>
Abolished in 1748, ...	<i>ib.</i>

WARDING, ACT OF, ...	493
----------------------------	-----

WARNING—

Of tenant, ...	1107
----------------------	------

WARRANTICE—

Clause of, ...	203, <i>et seq.</i>
Expressed or implied, ...	208
Real warrantice implied in excambions, ...	<i>ib.</i>
Personal warrantice, ...	<i>ib.</i>

	PAGE
WARRANTICE— <i>continued.</i>	
Against future voluntary deeds, ...	203
From fact and deed, ...	204
In assignation of debt, ...	<i>ib.</i>
Effect of absolute warrantice in assignation of debt, ...	<i>ib.</i>
In rights of doubtful value warrantice may be limited to sum paid, ...	205
Absolute warrantice in conveyance of lands, ...	<i>ib.</i>
Import of clause in Lands Transference Acts, ...	205, 599
Warrantice of consenter, ...	<i>ib.</i>
Loss arising under Statute passed after sale of lands, ...	205, 600
Effect of warrantice in case of eviction, ...	205, 599
Eviction of lease, ...	206
Warrantice is <i>stricti juris</i> , ...	<i>ib.</i>
How far it extends to servitudes, and loss by fatality, ...	206, 600
And to rights of real warrantice, ...	207
Action of recourse, ...	<i>ib.</i>
Expense of defence, ...	<i>ib.</i>
Intimation of threatened eviction to party liable in recourse, ...	207, 600
Sale of goods, ...	208
House let for particular use, ...	<i>ib.</i>
Sale of horse, ...	<i>ib.</i>
Clause of, in feu-charter, ...	599
Exception of current leases, ...	600, 601
Warrantice of trustees, ...	601
Charter by progress contains no warrantice, ...	687
Against augmentation of stipend, ...	588, 644
From fact and deed in sale of lands implies transaction, ...	205, 601
Clause of, in disposition, ...	645
Founds only personal claim, ...	<i>ib.</i>
Exception of feu-rights and leases, ...	<i>ib.</i>
Absolute warrantice by seller not a good answer to objections against title, ...	660
Is seller bound to discharge real warrantice?	668
Clause of, in bond and disposition in security, ...	1070
In agricultural lease, ...	1106
Available to sub-tenant, ...	1111
In mineral lease, ...	208, 1110
In assignation of lease, ...	1112
WARRANT OF REGISTRATION, ...	629, <i>et seq.</i>
In favour of assignee, ...	712, <i>et seq.</i>
In burgage lands, ...	741
WIDOW. See <i>Marriage-Contract—Marriage.</i>	
WIDOWS' FUND ANNUITY—	
Mode of dealing with, in marriage-contract, ...	804
Annuity under Ministers' Widows' Fund Act not assignable, ...	314
WIFE, RIGHTS OF.	
See <i>Marriage—Married Women.</i>	

INDEX.

1245

PAGE

WILL—

Provisions of Acts of 1861 as to execution of, by British and foreign subjects, ...	85, 86
Directions for disposal of lands can be given by will, ...	87
Effect of, in English form, upon prior <i>mortis causa</i> settlement executed in Scotland, ...	898

See *Testament*.

WINDING UP OF PUBLIC COMPANIES—

Under Act of 1862, ...	400, <i>et seq.</i>
Judicial winding up alone competent to unregistered company, ...	402
Liquidators, ...	<i>ib.</i>
Orders of Court of Session to have execution in England and Ireland, and <i>vice versa</i> , ...	403
Summary procedure to enforce payment of calls from contributors, ...	407

WITNESS—

Statutory provisions as to witnesses' subscription, ...	29-32
Where notaries sign for party, ...	41, 53, 54
Must see notaries subscribe, ...	41
Should see blind persons sign, ...	45, 46
Attestations of witnesses, ...	47, <i>et seq.</i>
Number of witnesses required, ...	47
Who may be instrumentary witnesses, ...	<i>ib.</i>
Grantee cannot attest deed in his own favour, ...	48
Notary subscribing for party cannot attest subscription of himself and co-notary, ...	<i>ib.</i>
Must subscribe without assistance, ...	<i>ib.</i>
Must know the party, ...	48, 49
Acknowledgment of subscription to witnesses, ...	49
Witnesses' subscription need not be in presence of party, ...	50
Re-execution of deed, ...	<i>ib.</i>
Evidence required in order to reduction of deed as not duly tested, ...	50-52
Witnesses should add the word 'witness' to their subscription, ...	53
Ought to see blanks filled up before subscription, ...	<i>ib.</i>
Deed signed by several persons before the same witnesses, ...	54
Designation of witnesses, ...	54, 55
Subscription as witness does not infer homologation of deed, ...	180-182
To instruments of sasine, ...	612, 614
To instrument of cognition and sasine, ...	1030
To bill signed by notaries, ...	433
To execution of charge, ...	505, 506
Giving evidence in submission must attend when ordered by Court, ...	358

WOMEN—

Said by Erskine to be excluded from being instrumentary witnesses, ...	48
Not eligible for office of factor <i>loco tutoris</i> , ...	107

	PAGE
WOOD—	
Heir of entail may cut and sell, if ripe for cutting, . . .	954
WRIT OF ACKNOWLEDGMENT.	
<i>See Heritable Securities, Transmission of.</i>	
WRIT OF CLARE CONSTAT.	
<i>See Clare Constat.</i>	
WRIT OF INVESTITURE, ...	735
WRIT OF RESIGNATION. <i>See Resignation.</i>	
WRITS—	
Delivery of, ...	643
Obligation to make forthcoming, ...	<i>ib.</i>
Inventory of, relative to disposition, ...	644
Assignment to, ...	593
<i>See Assignment to Writs.</i>	
WRITER OF DEED—	
Statutory provisions for naming and designing, ...	31, 32, 55, 56
Where writer of testing-clause different from writer of deed, ...	57, 58

INDEX OF STATUTES AND ACTS OF SEDERUNT.

I. SCOTCH AND BRITISH STATUTES.

	PAGE
Alexander II. c. 24, Brief of Distress, ...	1095
2 Robert I. c. 19, Act of Warding, ...	493
2 Robert I. c. 24, Prohibition of Subinfeudation, ...	636
David II. c. 34, Recognition in Crown Feus, ...	<i>ib.</i>
1400, c. 19, Recognition in Crown Feus, ...	<i>ib.</i>
1426, c. 87, Submissions, ...	370
1449, c. 18, Leases valid against Singular Successors, ...	530, 1101, 1113-1115
1457, c. 71, Tenure of Feu-Farm, ...	636
1469, c. 3, Apprising of Debtor's Lands, ...	536
1469, c. 36, Entry of Apprisers, ...	636, 768, 1095
1474, c. 57, Charge against Superior uninfest, ...	731
1481, c. 83, Ratifications by Married Women, ...	126
1503, c. 98, Plough Goods exempt from Poinding, ...	514
1540, c. 74, Signeting King's Letters and Charges, ...	506
1540, c. 75, Execution of Summonses, ...	502, 505
1540, c. 105, Against fraudulent Double Alienations, ...	689
1540, c. 106, Charge against Heir unentered, ...	762, 1028
1540, c. 117, Subscription of Writs made imperative, ...	28, 34, 38, 47
1555, c. 29, Subscription of Reversions, ...	29
1555, c. 33, Criminal Summonses, ...	301
1555, c. 38, Instruments of Resignation <i>ad remanentiam</i> , ...	727
1563, c. 81, Instruments of Resignation <i>ad remanentiam</i> , ...	<i>ib.</i>
1567, c. 27, Sasine in Burgh, ...	736, 737, 739
1578, c. 66, Competition of Confirmations, ...	683
1579, c. 70, Sabbath Observance, ...	444
1579, c. 80, Witnesses to Subscription, ...	29, 34, 38, 47, 54, 56, 612
1581, c. 119, Registration of Inhibitions, ...	131, 664, 1093
1584, c. 4, Registration in place of Sealing, ...	30, 211, 612, 613
1584, c. 133, Ministers disqualified from Civil Offices, ...	43
1584, c. 139, Execution of Decrees, ...	494

1585, c. 18, Curatory of Idiots, etc.,	12
1592, c. 138, Wrong Boundaries,	62
1593, c. 179, Writer's Name to be insert in Writs,	31, 55, 56
1594, c. 216, Buying of Pleas,	154
1597, c. 250, Irritancy <i>ob non solutum canonem</i> ,	584
1599, Registration of Sasines (4 Act Parl., 184),	619
1600, Registration of Sasines (4 Act Parl., 237),	id.
1600, c. 13, Registration of Hornings,	181, 664, 1093
1609, Registration of Sasines (4 Act Parl., 449),	618
1617, c. 12, Long Prescription,	654, 1027
1617, c. 13, Vicennial Prescription of Retours,	1027
1617, c. 14, Executors' Third,	863
1617, c. 16, Registration of Sasines,	542, 619
1621, c. 6, Comprisings,	1095, 1096
1621, c. 14, Gaming,	146
1621, c. 18, Alienations by Bankrupts,	167, 169, 279
1621, c. 20, Annual-rent after Denunciation,	244, 267, 507
1621, c. 27, Comprisings from Apparent Heirs,	1028
1621, c. 28, Usury,	245
1641, c. 57, Bonds with Clause of Interest,	239
1661, c. 15, Rescissory Act,	id.
1661, c. 29, Poinding on Decree of Inferior Judges,	513
1661, c. 31, Abbreviates of Adjudications,	664, 765
1661, c. 32, Heritable and Moveable Bonds,	239, 240
1661, c. 51, Arrestments,	519
1661, c. 62, Payment of Debts,	766, 1095-1097
1663, c. 21, Mansees, Glebes, and Stipends,	599
1669, c. 4, Poinding,	513
1669, c. 9, Quinquennial and Vicennial Prescription,	525
1669, c. 10, Interruption of Prescription,	479
1672, c. 16, Regulation of Judicatories,	131, 620, 664
1672, c. 19, Adjudication,	241, 537, 768, 1095
1681, c. 5, Witnesses in Writs (Stair's Act), 32, 34, 38, 41, 48, 52, 54-56, 184,	506, 613, 614, 726
1681, c. 10, Terce,	812
1681, c. 11, Registration of Sasines in Burgh,	741, 1030
1681, c. 17, Sale of Bankrupt's Lands,	537, 767, 768, 1095
1681, c. 20, Bills of Exchange,	469
1685, c. 22, Tailzies,	986, 962
1685, c. 38, Registration in Books of Council and Session,	218
1685, c. 43, Execution of Summonses in Orkney,	504
1686, c. 3, Subscription of Interlocutors,	93
1686, c. 4, Subscription of Executions,	506
1686, c. 17, Writing Bookways,	613
1686, c. 19, Registration of Sasines,	619
1690, c. 20, Sale of Bankrupt's Lands,	768
1690, c. 26, Confirmation of Testaments,	870, 1049
1693, c. 12, Citations,	506
1693, c. 13, Infeftments preferable according to Date of Registration,	620

INDEX OF STATUTES.

1249

	PAGE
1693, c. 14, Registers, ...	620
1693, c. 15, Registration after Creditor's Death, ...	214
1693, c. 18, Signing of Interlocutors, ...	98
1693, c. 35, Procuratories and Precepts available after Grantee's Death, ...	215, 601, 642, 687, 710, 1003, 1012
1695, c. 5, Septennial Limitation of Cautionry, ...	260-267, 321, 336, 337
1695, c. 24, Liability of Apparent Heirs, ...	384, 773, 810, 1027
1695, c. 41, Executor Creditors, ...	1047, 1048
1696, c. 5, Notour Bankruptcy, ...	169, 278, 336, 414
1696, c. 15, Securities, etc., allowed to be written Bookways, ...	82, 84, 58, 59, 618
1696, c. 18, Registration of Sasines, ...	619
1696, c. 25, Blank Bonds and Trusts, ...	53, 226, 232, 442, 1079
1696, c. 26, Settling of Schools, ...	1105
1696, c. 32, Act of Grace, ...	195
1696, c. 36, Inland Bills, ...	215, 469
1696, c. 39, Registration of Writs after Granter's Death, ...	214
1698, c. 4, Registration for Preservation, ...	215
7 Anne c. 5, Naturalization, ...	134
8 Anne, c. 9, Indenture Stamps, ...	189, 345
9 Anne, c. 14, Gaming, ...	146
12 Anne, stat. 2, c. 16, Legal Interest, ...	242
1 Geo. I. c. 54, Clan Act, ...	538, 590
4 Geo. II. c. 21, Naturalization, ...	134
7 Geo. II. c. 8, Stock-Jobbing—Barnard's Act, ...	147
10 Geo. II. c. 8, Stock-Jobbing, ...	ib.
17 Geo. II. c. 11, Ministers' Widows' Fund, ...	314
20 Geo. II. c. 43, Abolition of Heritable Jurisdictions, ...	538, 540
20 Geo. II. c. 50, Abolition of Ward-holding, ...	239, 507, 529, 531, 537, 538, 585, 711, 981, 1055
10 Geo. III. c. 51, Montgomery Act, ...	830, 982, 984-988, 1018
12 Geo. III. c. 72, Promissory-Notes, ...	215, 460, 469, 477, 484
13 Geo. III. c. 21, Naturalization, ...	134
14 Geo. III. c. 48, Life Insurance, ...	309
15 Geo. III. c. 28, Colliers and Salters, ...	140
17 Geo. III. c. 26, Life Annuities, ...	260
17 Geo. III. c. 30, Promissory-Notes, ...	443
23 Geo. III. c. 18, Bankruptcy and Promissory-Notes, ...	215, 469, 478
31 Geo. III. c. 25, Stamp-Duties on Bills of Exchange, etc., ...	197
33 Geo. III. c. 74, Bankruptcy (1793), ...	517
35 Geo. III. c. 55, Registration of Ships, ...	197
35 Geo. III. c. 63, Duties on Sea Insurances, ...	ib.
37 Geo. III. c. 136, Stamp-Duties, ...	197, 198, 346
39 Geo. III. c. 56, Colliers, ...	140
39 & 40 Geo. III. c. 98, Thelusson Act, ...	909, 989
42 Geo. III. c. 116, Land Tax, ...	981
48 Geo. III. c. 149, Stamp-Duties, ...	196
49 Geo. III. c. 42, Public Records, ...	216
49 Geo. III. c. 126, Sale of Offices of Trust, ...	141
54 Geo. III. c. 137, Bankruptcy (1814), ...	171, 332, 517, 523, 1078

	PAGE
55 Geo. III. c. 70, Court of Session Records, ...	217
55 Geo. III. c. 184, Stamp-Duties, 189, 193, 195, 196, 444, 457, 888, 889, 1038, 1039	1038, 1039
59 Geo. III. c. 61, Building of Gaols, ...	981
1 & 2 Geo. IV. c. 38, Court of Session and of Teinds, ...	217, 1002
1 & 2 Geo. IV. c. 78, Acceptances of Bills of Exchange, ...	460
4 Geo. IV. c. 49, General Turnpike Act, ...	988
4 Geo. IV. c. 97, Commissary Courts, ...	1032, 1035
4 Geo. IV. c. 98, Confirmations, ...	1038, 1043, 1046
5 Geo. IV. c. 87, Aberdeen Act, ...	802-807, 980
5 Geo. IV. c. 96, Masters and Workmen Arbitration, ...	353, 509
6 Geo. IV. c. 24, Small Debt Act, ...	509
6 Geo. IV. c. 87, British Consuls, ...	970
6 Geo. IV. c. 120, Judicature Act, ...	259, 298, 461, 503, 1033
7 Geo. IV. c. 67, Banking Societies Suing, ...	405
10 Geo. IV. c. 19, Registration of Sasines, ...	741
1 Will. IV. c. 46, Illusory Appointments (? English Act), ...	838
1 Will. IV. c. 69, Jury Court Abolition, ...	1032
4 & 5 Will. IV. c. 22, Apportionment Act, ...	259, 260
5 & 6 Will. IV. c. 62, Oaths Abolition, ...	127
5 & 6 Will. IV. c. 70, Imprisonment for Civil Debt, ...	509
6 & 7 Will. IV. c. 33, Erasures in Sasines, ...	626, 630, 727
6 & 7 Will. IV. c. 42, Rosebery Act, ...	981, 982
6 & 7 Will. IV. c. 43, Judicial Ratifications, ...	127
6 & 7 Will. IV. c. 58, Presentment of Bills of Exchange, ...	460
1 Vict. c. 41, Small Debt Act, ...	520, 525
1 & 2 Vict. c. 70, Rosebery Act Extension, ...	984
1 & 2 Vict. c. 114, Personal Diligence, 220, 244, 267, 471, 472, 492, 500, 503, 513, 516, 525, 1033	513, 516, 525, 1033
3 & 4 Vict. c. 48, Feus for Churches and Schools by Heirs of Entail, ...	983
4 & 5 Vict. c. 24, Rosebery Act Amendment, ...	982
5 & 6 Vict. c. 35, Property Tax, ...	145, 804
5 & 6 Vict. c. 45, Copyright, ...	313
5 & 6 Vict. c. 79, Stamp-Duties, ...	197
5 & 6 Vict. c. 82, Stamp-Duties, ...	190, 1087
7 & 8 Vict. c. 21, Stamp-Duties, ...	197, 198
7 & 8 Vict. c. 66, Aliens, ...	134
7 & 8 Vict. c. 110, Joint-Stock Companies Registration, ...	390
8 & 9 Vict. c. 17, Companies Clauses, ...	288, 389, 391, 395, 398, 981
8 & 9 Vict. c. 19, Lands Clauses Consolidation, ...	121, 366, 734, 981
8 & 9 Vict. c. 31, Heritable Securities (1845), 630, 663, 870, 927, 930, 1085, 1088	630, 663, 870, 927, 930, 1085, 1088
8 & 9 Vict. c. 33, Railways Clauses Consolidation, ...	981
8 & 9 Vict. c. 35, Infestments, 542, 543, 621-626, 643, 663, 710, 725, 740, 1029, 1030	542, 543, 621-626, 643, 663, 710, 725, 740, 1029, 1030
8 & 9 Vict. c. 109, Gaming, ...	147
9 & 10 Vict. c. 75, Joint-Stock Banks (Scotland and Ireland), ...	391
9 & 10 Vict. c. 101, Improvement of Land (Drainage), ...	122
10 & 11 Vict. c. 47, Service of Heirs, 420, 773, 774, 1004, 1026, 1030	420, 773, 774, 1004, 1026, 1030

	PAGE
10 & 11 Vict. c. 48, Lands Transference,	205, 538, 589, 593, 635, 639, 642, 682, 684, 722-727, 732, 760- 764, 929, 966, 1082, 1095, 1096
10 & 11 Vict. c. 49, Lands Transference (Burgage),	205, 738, 740, 760, 763
10 & 11 Vict. c. 50, Heritable Securities (1847),	238, 241, 504, 570, 663, 669, 675, 701, 1067, 1069, 1071, 1072, 1074, 1081
10 & 11 Vict. c. 51, Crown Charters,	544, 589, 704, 1004-1006, 1097
11 & 12 Vict. c. 36, Entail Amendment (Rutherford) Act,	121, 200, 284, 814, 820, 909, 936-938, 1017
12 & 13 Vict. c. 51, Pupils Protection,	111, 246, 395, 396
13 & 14 Vict. c. 36, Court of Session,	247, 259, 299, 504, 769, 1093, 1096
13 & 14 Vict. c. 97, Stamp-Duties,	190, 196, 750
15 & 16 Vict. c. 83, Patents,	313
16 & 17 Vict. c. 34, Income-Tax,	145, 804
16 & 17 Vict. c. 51, Succession Duty,	889
16 & 17 Vict. c. 59, Stamp-Duties,	191, 194, 1040
16 & 17 Vict. c. 63, Stamp-Duties,	1067
16 & 17 Vict. c. 94, Rutherford Act (Entails) Amendment,	969, 980, 981
16 & 17 Vict. c. 154, Lands Improvement Company's Act (Private),	122
17 & 18 Vict. c. 62, Heritable Securities (1854),	803, 1067, 1089
17 & 18 Vict. c. 83, Stamp-Duties,	192, 198, 431, 454, 604
17 & 18 Vict. c. 90, Usury Laws Abolition,	148, 242
17 & 18 Vict. c. 104, Merchant Shipping,	92, 195, 285, 411, 417, 421, 424, 514
18 & 19 Vict. c. 20, Property and Income-Tax,	804
18 & 19 Vict. c. 23, Moveable Succession,	795, 797, 798, 813, 861, 864
18 & 19 Vict. c. 63, Friendly Societies,	353
19 & 20 Vict. c. 25, Drafts on Bankers,	339, 489
19 & 20 Vict. c. 46, Imprisonment for Debt under 5 Geo. IV. c. 96,	509
19 & 20 Vict. c. 47, Joint-Stock Companies (1856),	281, 300, 375, 390-392, 395, 397-399, 403, 404, 436, 551
19 & 20 Vict. c. 56, Court of Exchequer, Scotland,	504, 511, 513, 517, 518
19 & 20 Vict. c. 60, Mercantile Law Amendment,	166, 251, 257, 258, 262, 267, 268, 277, 410, 429, 443, 514
19 & 20 Vict. c. 70, Lands Improvement Company's Act (Private),	122
19 & 20 Vict. c. 79, Bankruptcy (1856),	88, 143, 150, 169, 174, 195, 294, 306, 307, 323, 338, 387, 480, 751, 801, 907, 1073
19 & 20 Vict. c. 81, Stamp-Duties,	198, 346
19 & 20 Vict. c. 89, Marking of Pages dispensed with,	33, 60, 614
19 & 20 Vict. c. 91, To amend 54 Geo. III. c. 137,	173, 523, 769, 770, 1078, 1097
20 & 21 Vict. c. 14, Joint-Stock Companies (1857),	390, 391, 395, 397, 398, 402-404
20 & 21 Vict. c. 19, Bankruptcy and Real Securities (Scotland),	1857, 173, 1079
20 & 21 Vict. c. 26, Registration of Leases,	306, 315-317, 1101, 1112, 1113, 1115
20 & 21 Vict. c. 49, Joint-Stock Banking Companies (1857),	299, 390, 391
20 & 21 Vict. c. 56, Distribution of Business in Court of Session,	963
21 & 22 Vict. c. 20, Stamp-Duties,	194, 488
21 & 22 Vict. c. 56, Confirmation and Probate (1858),	87, 1032, 1035

	PAGE
21 & 22 Vict. c. 60, Joint-Stock Companies Amendment (1858),	390, 391, 395 , 397, 402, 403, 551
21 & 22 Vict. c. 76, Titles to Land (Scotland) 1858,	58, 223, 297, 542-543 , 551, 554, 555, 570, 593, 626, 629, 630, 635 , 641, 651, 696, 697, 699, 705-708, 712-715, 723-730, 734, 735, 756, 761-764, 803, 823 , 872, 926-928, 930, 941, 963, 990, 1004 , 1007, 1117, 1055, 1062, 1074, 1087-1089
21 & 22 Vict. c. 79, Drafts on Bankers Amendment,	489
21 & 22 Vict. c. 91, Joint-Stock Banking Companies Limited Liability,	390 , 391, 551
22 Vict. c. 30, Confirmation and Probate Amendment (1859),	1038
22 & 23 Vict. c. 36, Stamp-Duties,	13
22 & 23 Vict. c. 63, Law Ascertainment Facilities,	89
23 & 24 Vict. c. 15, Stamp-Duties,	84, 1035, 1038
23 & 24 Vict. c. 33, Bankruptcy (Scotland) Amendment (1860),	751
23 & 24 Vict. c. 80, Inventory Duty on Heritable Securities,	84, 193, 197, 867, 1038, 1039
23 & 24 Vict. c. 111, Stamp-Duties,	193
23 & 24 Vict. c. 143, Titles to Land (Scotland), 1860,	58, 223, 247, 285, 291 , 297, 504, 555, 581, 630, 635, 640, 641, 696 , 699, 700, 705, 736-743, 756, 761-764, 771, 803, 823, 872, 926, 927, 930, 931, 941, 963 , 1017, 1030, 1031, 1062, 1074, 1088, 1089
24 & 25 Vict. c. 50, Railway Mortgage Transfer,	287
24 & 25 Vict. c. 84, Gratuitous Trustees,	837, 879, 885, 893, 894, 906
24 & 25 Vict. c. 86, Conjugal Rights Amendment,	122, 792, 794, 796
24 & 25 Vict. c. 92, Stamp-Duties,	1039
24 & 25 Vict. c. 114, Wills of Personal Estate,	873
24 & 25 Vict. c. 121, Wills of Personal Estate and Domicile,	86
25 & 26 Vict. c. 37, Crown Private Estates (1862),	91
25 & 26 Vict. c. 85, Transmission of Moveable Property (Scotland) 1862,	280, 283, 285, 289, 308-310, 315-319, 409
25 & 26 Vict. c. 89, The Companies Act (1862),	92, 299, 374, 375, 385, 391- 408, 436, 551
26 & 27 Vict. c. 115, Gratuitous Trustees Amendment,	879, 885, 893, 894, 906
27 & 28 Vict. c. 19, The Companies Seals Act (1864),	400
28 & 29 Vict. c. 96, Inland Revenue,	193

II. ENGLISH AND IRISH STATUTES.

	PAGE
18 Edward I. c. 1, <i>Quia Emptores</i> , ...	636
25 Edward I., Confirmation of Magna Charta, ...	26
5 Edward VI. c. 16, Sale of Offices of Trust, ...	141
21 James I. c. 16, Statute of Limitations, ...	477
29 Charles II. c. 3, Statute of Frauds, ...	25
29 Charles II. c. 7, Observance of Sunday, ...	444
6 Anne, c. 35, Registration of Lands, East Riding, ...	8
1 Will. IV. c. 46, Illusory Appointments, ...	838
1 Vict. c. 26, Wills—Lord Campbell's Act, ...	26, 92
7 & 8 Vict. c. 113, Joint-Stock Banks, ...	391
12 & 13 Vict. c. 106, Bankruptcy, 1849, ...	307
18 & 19 Vict. c. 133, Limited Liability, 1855, ...	390, 405
20 & 21 Vict. c. 60, The Irish Bankrupt and Insolvent Act, 1857, ...	88, 307
24 & 25 Vict. c. 134, Bankruptcy, 1861, ...	88

III. ACTS OF SEDERUNT.

23d November 1613, Caution in Suspensions, ...	495, 504
12th July 1620, Alienations in Defraud of Creditors (<i>see</i> 1621, c. 18), ...	167
6th June 1661, Charters, etc., to be in Latin as formerly, ...	544
28th February 1662, Creditors of Persons Deceased, ...	1047
9th December 1670, Warrant to Clerks for Registration of Bonds, ...	213
19th February 1680, Renunciations by Persons inhibited, ...	1091
26th February 1684, Decrees of Adjudication, ...	1096
31st March 1685, Sale of Bankrupts' Lands, ...	772
21st July 1688, Notaries, ...	40, 42, 49
29th April 1695, Regulations as to Submissions, ...	350, 356
11th February 1708, Symbols in Resignations, ...	739
23d November 1711, Processes of Count and Reckoning, etc., ...	769
18th March 1748, Abolition of Heritable Jurisdictions, ...	540
17th January 1756, Sale and Ranking, ...	618, 770, 772
17th January 1756, Registration of Sasines, ...	619
11th July 1794, Sale and Ranking, ...	772
6th March 1829, Extracts of Decrees, ...	94
24th December 1838, Date of Extracts, ...	ib.
24th December 1838, Relative to Personal Diligence Act—1 & 2 Vict. c. 114, ...	220, 503
24th December 1838, Relative to Judicature Act—6 Geo. IV. c. 120, ...	259, 298, 523
18th November 1848, Forms of Consents under Rutherford Act—11 & 12 Vict. c. 36, ...	200
31st October 1850, Relative to Court of Session Act,—13 & 14 Vict. c. 36, ...	769, 1096

INDEX OF CASES.

NOTE.—Where there are two or more cases of the same name, the date and subject of each is given. Where the same case is quoted more than once, and as an authority for different points, the subject to which each quotation relates is given ; but, where the same case is quoted more than once as an authority for the same point, its subject is not given.

	PAGE		PAGE
A. B. (1832), <i>Pactum Illicitum</i> ,	152	Adam v. Drummond,	69
A. B. (1838), <i>Ranking and Sale</i> ,	770	Adam v. Duthie,	624
A. v. B. (n. d.), <i>Ranking and Sale</i> ,	774	Adam v. Johnstone,	487
A. v. B. (1540), <i>Intimation of Assignment</i> ,	295	Adam v. M'Dougal,	325
A. v. B. (1612), <i>Ratification by Wife</i> ,	127	Adam v. M'Robbie,	306
A. v. B. (1750), <i>Drawer's Subscription</i> ,	435	Adam v. Thomson,	993
A. v. Marquis of Huntly,	110	Adam v. Watson,	453
Abbott and Son v. Skelton,	363	Adamson v. Macmitchell,	302
Abercorn, Marquis of, v. Grieve,	750	Advocate-General v. Hamilton,	889
Abercorn, Marquis of, v. Hamilton,	987	Advocate-General v. Oswald,	313
Abercorn, Marquis of, v. Marnoch,	984	Advocate-General v. Smith,	850
Abercromby v. Innes,	54	Advocate-General v. Swinton,	1053
Aberdeen, Bishop of, v. Viscount Ken-		Advocate-General v. Williamson,	889
mure, <i>Witnesses to Sasine</i> ,	613	Advocates, Faculty of, v. Dickson,	302
Aberdeen, Bishop of, v. Viscount Ken-		Agnew v. Agnew (1767), <i>Delivery of</i>	
mure, <i>Charter of Confirmation</i> ,	639	<i>Deed</i> ,	96
Aberdeen, Earl of, v. Laird, <i>Tutors'</i>		Agnew v. Agnew (1810), <i>Locality Pro-</i>	
<i>Powers</i> ,	110	<i>vision</i> ,	807
Aberdeen, Earl of, v. Laird, <i>Missives of</i>		Agnew v. Macniven,	974
<i>Sale</i> ,	648	Agnew v. Macrae,	484
Aberdeen, Earl of, v. Merchiston's		Agnew v. Earl of Stair,	115
Creditors,	303	Agnew v. Stewart,	965
Aberdeen, Earl of, v. Scot's Creditors,	524	Aikenhead,	102
Aberdeen, King's College of, v. Lady		Ailsa, Marquis of,	985
James Hay,	591	Airdrie, Magistrates of, v. Smith,	667
Aberdeen Railway Company v. Blaikie,		Aitchison v. Hopkirk,	1057
	150, 352	Aitken v. Brydon,	195
Aberdeen, Tailors of, v. Coutts, 573-576,	580,	Aitken v. L. Grinialaw,	616
	585	Aitkins v. Orr,	128
Aberdeen Town and County Bank v.		Alexander,	134
Clark, (1859), <i>Partners' Shares</i> ,	380	Alexander v. Agnew,	327
Aberdeen Town and County Bank v.		Alexander v. Alexander (1830), <i>Holo-</i>	
Clark (1860), <i>Proving of Tenor</i> ,	383	<i>graph</i> ,	74
Abernethie v. Forbes,	228	Alexander v. Alexander, <i>Promissory-</i>	
Abernethie v. Gordon,	973	<i>Note</i> ,	197
Aboyne, Earl of, v. Farquharson,	590	Alexander v. Alexander (1849), <i>Substi-</i>	
Accountant of Court in re Wilson,	130	<i>tution in Legacy</i> ,	923

INDEX OF CASES.

1255

	PAGE		PAGE
Alexander v. Badenoch,	263	Argyle, Earl of, v. M'Donald, <i>Intima-</i>	
Alexander v. Lundie,	204	tion of Assignment,	305
Alexander v. M'Lay,	513	Argyle, Earl of, v. M'Donald, <i>Discharge</i>	
Alexander v. Redfearn,	766	of Feu-duty,	703
Alexander v. Scott, <i>Joint Obligation</i> ,	249	Argyle, Earl of, v. Laird of M'Mac-	
Alexander v. Scott, <i>Protest</i> ,	465, 467	naghten,	654, 656
Alison v. Alexander,	343	Argyll, Duke of, v. Robertson,	567
Alison v. Directors of African Co.,	407	Argyll, Duke of, v. Feuars of Shear-	
Alison v. Earl of Dundonald's Trustees,	883	dale,	571
Alison v. Proudfoot,	1102	Armstrong v. Johnstone,	478, 486
Allan v. Cameron's Creditors,	1063	Armstrong v. Wilson,	474
Allan v. Galli,	469	Arnot v. Turner,	612
Allan v. M'Kean,	52	Arnott v. Calder,	221
Allan v. M'Rae,	931	Arrat v. Wilson,	176
Allan v. Young,	474	Arrol v. Cook,	174
Allan and Mearns v. Skene,	140	Atholl, Duke of,	985
Allardes v. Morison,	242	Atholl, Duke of, v. Macinroy,	569
Allardice v. Smart,	843, 998	Atkinson, Mure, and Boyle v. Lear-	
Alston v. Denniston and Co.,	270	month,	522
Anderson,	1057	Auchinbreck, Creditors of, v. Maclauch-	
Anderson v. Anderson (1832), <i>Minor's</i>		lan,	645
Right to Restitution,	116	Auchinleck v. Millar,	445
Anderson v. Anderson (1857), <i>Division</i>		Auchterlony's Creditors,	452
and Sale,	775	Ayton v. Alison's Creditors,	866, 998
Anderson v. Bruce,	810	Aytoun v. Dundee Banking Company,	385
Anderson v. Buchanan,	125	Aytoun v. Magistrates of Kirkcaldy,	
Anderson v. Cock,	41	Consolidation,	731
Anderson v. Gill,	75	Aytoun v. Magistrates of Kirkcaldy,	
Anderson v. Lorimer,	435	Burgage,	736
Anderson v. Low,	658		
Anderson v. Marshall,	1057		
Anderson v. Matheson,	662	B. SUPPLICANT,	719
Anderson v. Nasmyth,	1098	Baikie's Trustees v. Oxley,	839
Anderson v. Shand,	128	Baillie,	985
Anderson v. Stewart,	676	Baillie v. Clark,	780
Anderson v. Thomson,	617	Baillie v. Doig,	479
Anderson v. Western Bank,	414	Baillie v. Grant,	941
Andrew v. Syme and Co.,	445	Baillie v. Laidlaw,	1064
Andrews v. Sawyer,	58	Baillie v. Lockhart,	47
Anent a Postscript,	77	Baillie v. Scott,	226
Annand v. Chessels,	834	Baillie v. Tennant,	997
Annandale,	219	Baillie and Rogers v. Pollock,	371
Annandale v. Macniven,	923	Bain v. Black,	377
Anonymous (1638), <i>Holograph</i> ,	73	Bain v. Macmillan (1678), <i>Delivery of</i>	
Anonymous (1683), <i>Delivery of Deed</i> ,	102	Deed,	100, 105
Anonymous (1754), <i>Bill</i> ,	454	Bain v. Macmillan (1679), <i>Intimation of</i>	
Anonymous (1754), <i>Lease</i> ,	1112	Assignment,	303
Anstruther v. Wilkie,	154	Bain v. Stewart,	192, 1108
Arbuthnot v. Douglas,	480	Baird,	110
Arbuthnot v. Gentleman,	348	Baird v. Fortune,	567
Arbuthnot and Company v. Ainslie,	422	Baird v. Japp,	651
Archibald v. Marshall,	54	Baird v. Little's Trustees,	484
Argyle v. Hamilton,	552	Baird v. Robertson,	565
Argyle, Duke of, v. Creditors of Tar-		Baird v. Earl of Rosebery,	236
bert,	590	Bald v. Buchanan,	721

	PAGE		PAGE
Balfour v. Lyle,	467	Belschier v. Moffat,	736
Balfour's Trustees v. Edinburgh and Northern Railway Company,	405	Belshier v. his Heir,	774
Ballantine v. Watson,	513	Berry v. Bowes,	504
Ballantyne and Company v. Kerr,	346	Berry v. Henderson's Trustees,	857
Ballenden, Lord, Creditors of,	302	Berry v. Holden,	561
Ballenden v. Duke of Argyle,	585	Bertram v. Macintosh,	383
Ballingal,	246	Bertrams v. Barry,	516
Ballingall v. Henderson,	832	Beveridge v. Crawford,	1029
Ballingall v. Robertson,	37	Beveridge v. Wilson,	1073
Balvaird v. Latimer,	99	Binning v. Auchinbreck's Creditors,	858
Bannatine,	115	Binning v. Coutie,	870
Bannatyne v. Gibson,	363	Binny v. Smith,	123
Bannatyne v. Wilson,	198	Birch v. Douglas,	124
Barber v. Caddell,	46	Birkbeck v. Ross,	1114
Barbour,	170	Birrel v. Moffat,	41
Barbour v. Milligan,	467	Birrell v. Dundee Gaol Commissioners,	360
Barbour v. Newall,	192	Birtwhistle v. Lord Clerk-Register,	219
Barbour v. Wight,	363	Bisset v. Walker,	785
Barbour and Blackwood v. Hair,	487	Black v. Cuthbertsons,	336
Barclay v. Alexander,	1098	Black v. Dick,	651
Barclay v. Liddel,	204	Black v. Scott,	523
Barham v. Lord Mordaunt,	293	Black v. Shand's Creditors,	482
Barr v. Spiers,	377	Black v. Young's Trustees,	80
Barron v. Rose,	647	Blackwood v. Earl of Sutherland,	602
Barry v. Thorburn,	907	Blaikie v. Aberdeen Railway Company,	358
Barstow v. Stewart, <i>Sasine</i> ,	603	Blain v. Paterson,	896
Barstow v. Stewart, <i>Fiduciary Fee</i> ,	824	Blair v. Allen,	145, 804
Bartilmo v. Harrington,	780	Blair v. Anderson,	237
Bartlet v. Buchanan,	795	Blair v. Blair (1671), <i>General Discharge</i> ,	327
Bathgate v. Cochrane,	105	Blair v. Blair (1849), <i>Competition of Heirs</i> ,	890, 991
Baugh v. Murray,	950	Blair v. Blair (1849), <i>Lease</i> ,	1112
Bayne v. Walker,	1106	Blair v. Blair (1849), <i>Collation</i> ,	862
Beaton v. Bulloch,	328	Blair v. Blair (1849), <i>Settlement, Instructions</i> ,	905
Beaton v. McDonald,	149	Blair v. Dempster,	262
Beatson v. Beatson,	858	Blair v. Douglas, Heron, and Co.,	381
Beattie,	198	Blair v. Earl of Galloway and Others,	222
Beattie v. Haliburton (1823), <i>Bill, Erasure</i> ,	476	Blair v. Galloway,	1076
Beattie v. Haliburton, (1827), <i>Bill, Prescription</i> ,	485	Blair v. Shedden,	658
Beaumont v. Lord Glenlyon,	562	Blair v. Simpson,	61
Bedwells v. Tod,	312, 921	Blair v. Stewart,	773
Beg v. Brown,	279	Blairs v. Bell,	833
Beizly v. Napier,	866	Blairquhen, Lady, v. Her Tenants,	616
Belches v. Stewart,	553	Blantyre, Lord,	53
Bell v. Carruthers,	1014	Blantyre, Lord, v. Dunn,	1057
Bell v. Gartshore,	716	Blonay, Baroness de, v. Oswald's Trustees,	811
Bell v. Henderson,	108	Boag v. Fisher,	490
Bell v. Herdman,	265	Bog v. Hepburn,	39
Bell v. Lamont,	645	Bolden v. Ferguson,	169
Bell v. Thomson,	176	Bolden v. Fogo,	153
Bell v. Willison,	1050	Bon v. Lord Rollo,	471, 478
Bells v. Mason,	856, 918	Bon Accord Marine Insurance Company v. Souter's Trustees,	894, 906
Bellenden v. Lady E. Kerr's Trustees,	1029		

INDEX OF CASES.

1257

	PAGE		PAGE
Bonar v. Lyon,	205	Brodie v. Brodie,	181
Bonar v. Macdonald,	340	Brodie v. Keith,	275
Bonjedward, Creditors of,	521	Brodie v. Sheddin,	486
Bonthrone v. Bonthrone's Creditors,	1070	Brodie v. Stewart,	1049
Bontine v. Graham, <i>Consolidation</i> ,	731	Broomfield v. Campbell,	858
Bontine v. Graham, <i>Contravention</i> ,	973	Broomfield v. Young,	70
Borthwick v. Borthwick,	955	Broomhall v. Govan,	277
Borthwick v. Grant,	128	Brough's Creditors v. Selby's Heirs,	1078
Borthwick v. Ker,	616	Broughton v. Stewart, Primrose and Co.,	424
Boston v. Horseburgh,	921	Brown (1809), <i>Error in Deed</i> ,	218
Boswall v. Arnot,	314	Brown (1815), <i>Factor loco tutoris</i> ,	108
Boswell v. Boswell,	63, 68, 954	Brown (1839), <i>Public Burdens</i> ,	1105
Boulton and Others v. Mansfield,	385	Brown v. Advocate-General,	193, 786
Bousie v. Harvie,	453	Brown v. Bain,	460
Bowack,	195	Brown v. Bedwell,	191
Bowie v. Bowie,	991	Brown v. Binnie,	213
Boyd v. Boyd,	992	Brown v. Blaikie,	521
Boyd v. Earl of Galloway,	144	Brown v. Brown,	235
Boyd v. Hamilton,	670, 796	Brown v. Burt,	151, 757
Boyd v. Sinclair,	1111	Brown v. Cheyne and M'Kean,	660
Boyd v. Stone,	91	Brown v. Countess of Dalhousie's Creditors,	952
Boyle,	112	Brown v. Govan,	832
Braid v. Douglas,	564	Brown v. Herries,	69
Braid v. Linton,	439	Brown v. Kerr, <i>Bill, Presumption of Payment</i> ,	458
Braid v. Ralston, <i>Heir-Male</i> ,	993	Brown v. Kerr, <i>Notice of Dishonour</i> ,	465
Braid v. Ralston, <i>Service</i> ,	1005	Brown v. Miller,	1044
Braidwood v. Gavin,	502	Brown, Miller v.	1063
Braimer,	132	Brown v. Murray,	950
Brandon v. Stephens,	752	Brown's Trustees v. Webster,	591
Brashe v. M'Kinnon,	152	Browns v. Brown's Trustees,	869
Breadalbane, Marquis of, v. Marchioness of Chandos,	841	Browning v. Hamilton,	831
Breadalbane Trustees v. Earl of Breadalbane,	986	Bruce v. —,	109
Breadalbane Trustees v. Duchess of Buckingham,	911	Bruce v. Bruce (1675), <i>Delivery of Deed</i> ,	104
Breadalbane's Trustees v. Marquis of Breadalbane,	827	Bruce v. Bruce (1799), <i>Resolutive Clause</i> ,	959
Breadalbane's Trustees v. Pringle,	915	Bruce v. Bruce (1826), <i>Testator's Debts</i> ,	872
Brechin, Town-Council of, v. Arbuthnot, <i>Date of Sasine</i> ,	607	Bruce v. Bruce-Carstairs,	70
Brechin, Town-Council of, v. Arbuthnot, <i>Symbols</i> ,	611	Bruce v. Glen,	840
Bremner v. Bell's Trustees,	893	Bruce v. Grant,	142
Bridges v. Fordyce,	259	Bruce v. Hall,	502
Bridges v. Willison's Trustees,	421	Bruce v. Hamilton,	113, 800
Briggs' Trustees v. Dalzell,	206	Bruce v. Rashiehill,	1060
Brisbane,	127	Bruce v. Ross,	147
British Linen Company v. Alexander,	385	Bruce v. Stein's Representatives,	264
British Linen Company v. Espin,	325	Bryden v. Gibson,	775
British Linen Company v. Lord Reay,	238	Brysson v. Mitchell,	364, 366
British Linen Company v. Monteith,	256	Buccleuch, Duke of, v. Cunynghame,	655
British Linen Company v. Thomson,	339	Buccleuch, Duke of, v. Ewart,	984
Brock v. Cabbell,	1113	Buchan v. Cockburn,	546
Brock v. Hamilton,	775	Buchan, Earl of,	111, 149
		Buchan, Earl of, v. Scottish Widows' Fund Insurance Company,	227
		Buchan v. Inglis,	81
		Buchan v. Risk,	126

	PAGE		PAGE
Buchan and Inglis v. Harper,	904	Campbell, <i>Entail, Deed of Consent</i> ,	85
Buchanan v. Buchanan,	903	Campbell v. Anderson,	424
Buchanan v. Dennistoun,	74	Campbell v. Baird,	113, 345
Buchanan v. Carrick,	950	Campbell v. Bell,	42
Buchanan v. Dickie,	125	Campbell v. Cameron,	828
Buchanan v. Duncan,	433	Campbell v. Campbell (1740), <i>Vesting of Fee</i> ,	782
Buchanan v. French,	249	Campbell v. Campbell (1748), <i>Recording Tailzie</i> ,	963
Buchanan v. Muirhead,	353	Campbell v. Campbell (1757), <i>Deathbed</i> ,	902
Buchanan v. Paterson,	905	Campbell v. Campbell (1761), <i>Interdictor</i> ,	150
Buchanan v. Royal Bank,	330, 1044	Campbell v. Campbell (1793), <i>Bill, Absolute Order</i> ,	440
Buchanan v. West of Scotland Iron Company,	406	Campbell v. Campbell (1797), <i>Bill, Prescription</i> ,	481
Buchanan v. Speira,	848	Campbell v. Campbell (1815), <i>Entailer's Debt</i> ,	967
Buchanan v. Laird of Buchanan,	138	Campbell v. Campbell (1818), <i>Entail, Widow's Jointure</i> ,	805
Bullions v. Baine,	123	Campbell v. Campbell (1819), <i>Sasine</i> ,	608
Buntin v. Buchanan,	138	Campbell v. Campbell (1834), <i>Aberdeen Act, Rental</i> ,	829
Burden v. Burden,	955, 960	Campbell v. Campbell (1848), <i>Vicennial Prescription</i> ,	1027
Burleigh v. Horwood,	1094	Campbell v. Campbells (1739), <i>Children's Provisions</i> ,	838
Burly v. Syme,	564	Campbell v. Campbells (1770), <i>Heir-Male</i> ,	994
Burnet v. Burnet (1765), <i>Heirs whatsoever</i> ,	996	Campbell v. Cunninghame,	1111
Burnett v. Burnett (1854), <i>Personal Bond</i> ,	237	Campbell v. Douglas,	986, 987
Burnet v. Ewen,	176	Campbell v. Dunn, <i>Subinfeudation</i> ,	573
Burnet v. Morrow,	104	Campbell v. Dunn, <i>Superior's Agent</i> ,	581
Burnet v. M'Kinney,	1102	Campbell v. Edderline,	751
Burnets v. Forbes,	918	Campbell v. Faikney,	521
Burnett,	109	Campbell v. Farquhar,	249
Burns,	675	Campbell v. Haldane,	691
Burnside v. Smith,	918	Campbell v. Lord Monzie,	878
Bushby v. Renny,	35, 835	Campbell v. M'Glashan,	179
Bute, Earl of, v. Campbell,	114	Campbell v. Macalister,	585
		Campbell v. Montgomery,	90, 327
CADDELL v. RAITH,	162	Campbell v. Monypenny,	952
Cadzow v. Wilson,	196	Campbell v. Napier,	326
Cairnis v. Leyis,	288	Campbell v. Orphan Hospital,	1056
Cairns v. Garroch's Creditors,	228	Campbell v. Pollock,	856
Cairns' Trustees v. Brown,	464	Campbell v. Ramsay,	88
Caitcheon v. Ramsay,	656, 657	Campbell v. Robertson,	48
Calder v. Lyall,	462	Campbell v. Scotland (1778), <i>Pactum Illicitum</i> ,	141
Calderwood v. Schaw,	75	Campbell v. Scotland and Jack (1794), <i>Purging Irritancy</i> ,	585, 1097
Caledonian Insurance Company v. British Linen Company,	488	Campbell v. Steele,	653
Caledonian Railway Co. v. Lockhart,	361	Campbell v. Stewart,	410, 811
Callander v. Callander's Trustees, <i>Writer's Designation</i> ,	56	Campbell v. Turner,	113
Callander v. Callander's Trustees, <i>Adoption of Improbative Writ</i> ,	81, 904	Campbell v. Westerra,	1057
Callender v. Kilpatrick,	475	Campbell v. Wightman's Representatives,	953
Calton, Weavers of, v. Weavers of Glasgow,	140		
Cameron,	132		
Cameron and Gunn v. Ainslie,	561		
Cameron v. Boswell,	524		
Cameron v. Dick's Trustees,	87, 903		
Cameron v. Robertson,	456		

INDEX OF CASES.

1259

	PAGE		PAGE
Campbell, Thomson, and Company v. Glass and Son,	447	Chesman v. Nainby,	140
Campbell's Children v. Campbell,	902	Cheyne v. M'Donald,	199
Campbell's Creditors,	312	Chiene v. Western Bank,	438
Campbell's Lady v. his Creditors,	850	Chiealy v. Cuthbert,	346
Campbell's Trustees v. Campbell,	978	Christie v. Gibb,	118
Campbell's Trustees v. Paul,	1100	Christie v. Henderson,	483
Campbell's Trustees v. Thomson,	380	Christie v. Patersons,	922
Campbells v. Campbell (1747), <i>Testator's Debts</i> ,	873	Christie v. Royal Bank,	257, 365
Campbells and Others, <i>Entail, Right to Burden</i> ,	981	Chrystie v. Fairholme,	157
Cargill v. Muir,	702, 1052	Church v. Sharpe,	196
Carleton, Creditors of, v. Gordon,	1023	Church of England Assurance Company v. Wink, <i>Assignment of English Policy</i> ,	308
Carlyle v. her Husband's Creditors,	795	Church of England Assurance Company v. Wink, <i>Discharge of Cautioner</i> ,	339
Carmichael v. Anstruther,	206	Church of England Assurance Company v. Wink, <i>Rei Interventus</i> ,	184
Carmichael v. Carmichael's Trustees,	182	Churnside v. Currie,	124
Carmichael v. Colquhoun,	565	City of Glasgow Bank v. Sword,	1081
Carmichael v. Mosman,	524	Clark v. Bank of Scotland,	438
Carnegie v. Clark,	998	Clark v. Burns and Stewart,	841
Carnegie v. Knowles,	237	Clark v. City of Glasgow Insurance Company, <i>Back Bond</i> ,	1080
Carnegie v. Ramsay,	71	Clark v. City of Glasgow Insurance Company, <i>Real Burden</i> ,	575
Carnegie v. Scott,	614	Clark v. Hay's Trustees,	853
Carnegy v. Cruikshank's Creditors,	739	Clark v. Laird of Balgounie,	42
Carnoussie v. Auchanachie,	132	Clark v. Loos,	519
Carrick v. Carse,	265	Clark v. Macpherson,	186
Carrick v. Key,	487	Clark v. Paterson,	918
Carron v. Cowan and Company,	135	Clark v. Stuart,	267
Carron Company v. Muirhead,	441	Clark v. Wardel,	613
Carruthers v. Irvine,	1115	Clarke v. Shepherd,	366
Carruthers v. Johnston,	795	Clarkson v. Edgar,	277
Carruthers v. Scott,	662	Cleghorn v. Elliott, <i>Entail, Provisions</i> ,	827
Carse v. Russel,	993	Cleghorn v. Elliott, <i>Extinction of Securities</i> ,	1090
Carstairs,	906	Cleghorn v. Yorston,	243
Carswell v. Carswell's Trustees,	868	Cleland v. Cleland,	51
Carswell v. Irvine,	249	Cleland, Creditors of,	770
Carter v. Mackintosh, <i>Assignment</i> ,	286	Cleland v. Irvine,	300
Carter v. Mackintosh, <i>Bill</i> ,	447	Cleland v. M'Lellan,	82
Cassie v. Fleming,	175	Clerk v. Baird,	1106
Cassillis, Earl of, v. Earl of Wigton,	1028	Clerk v. Brebner,	87
Cassillis, Earl of, v. Lord Bargeny,	688	Clerk v. Gordon,	208, 600
Cassillis, Earl of, v. Macadam,	1102	Clunie v. Stirling,	118
Cassillis', Earl of, Trustees, v. Kennedy,	58	Clydesdale, Marquis of, v. Dundonald,	114
Cathcart v. Cassillis,	1014, 1015	Clyne v. Swanson,	153
Cathcart v. Cathcart,	890	Cochrane v. Bailie,	946
Cathcart v. MacLaine,	966, 968	Cochrane v. Black,	387, 892
Cathcart v. Schaw,	954	Cochrane v. Cochrane,	987
Cattanach v. Birnie,	111	Cochrane v. Gilchison,	416
Cauvin's Hospital, Governors of,	892	Cochrane v. Guthrie,	358
Caves v. Spence,	264	Cochrane v. Ramsay,	1026
Chalmers v. Chalmers,	911	Cockburn v. Cameron,	881
Channell v. Seton,	213	Cockburn v. Edward,	651
Chaplin v. Allan,	510		
Charles v. Skirving,	459		
Charteris v. Young,	765		

	PAGE		PAGE
Cockburn v. Gibson,	434	Crawford,	111
Cockburn's Relict v. Edward,	364	Crawford v. Boyd,	146
Codrington v. Johnston's Trustees, 334,	1027	Crawford v. Earl of Dundonald,	933
Colebrooke v. Gibson-Craig,	260	Crawford v. Duncan,	61
Collie v. Price's Trustees,	100	Crawford v. Haliburton,	131
Collo's Trustees v. Grierson,	968	Crawford v. Hotchkiss,	335
Colquhoun v. Anderson,	123	Crawford v. Kerr,	96
Colquhoun v. Campbell,	914	Crawford v. Coutts,	902
Colquhoun v. Christie,	186	Crawford v. Crawford,	84, 866
Colquhoun v. Colquhoun,	1020, 1021	Crawford v. Durham,	656
Colquhoun v. Paton,	567	Crawford, Earl of, v. Ure,	1042
Colt v. Cunningham,	152	Crawford v. Hamilton,	360
Coltart v. Cowie,	891	Crawford v. Maxwell,	1111
Colvill v. Lord Colvill's Executors,	31	Crawford, Tenants of Earl of, v. Rolloch,	221
Colvin v. Alison,	1015	Crawford v. Vallenge's Heirs,	103
Commercial Bank v. Hannah,	468	Creighton v. Rankin,	341
Commercial Bank v. Paton,	476	Crichton (1612), <i>Cautioner</i> ,	338
Condie v. Buchan,	50, 51, 222	Crichton (1802), <i>Subscription</i> ,	56
Cook v. Clayworth,	133	Crichton (1802), <i>Testament</i> ,	903
Cooke v. Falconer's Representatives,		Crichton v. Gibson,	442
<i>Inhibition</i> ,	1094	Crichton v. Syme,	90
Cooke v. Falconer's Representatives,		Crichton's Creditors v. Society for Pro-	
<i>Mandatory</i> ,	504	pagating Christian Knowledge,	1015
Cooper v. Bertram,	353	Crichton (1857), <i>Factor loco tutoris</i> ,	110
Cooper v. Blackmore and Company,	339	Crichton v. Lord Air,	1115
Cormack v. Anderson,	103, 170	Crockat v. Brown,	294
Corsan v. M'Gowan,	150	Crockart v. Dundee and Arbroath Rail-	
Corse v. Masterton,	520	way Company,	518
Corson,	351	Crosbie v. Picken,	37
Coult v. Angus,	278	Crosbie v. Wilson, <i>Mark</i> ,	46
Couts v. Straiton, <i>Subscription by Blind</i> ,	44	Crosbie v. Wilson, <i>Adoption of Improb-</i>	
Couts v. Straiton, <i>Initials</i> ,	46	<i>tive Writ</i> ,	80
Coutts v. Tailors of Aberdeen, 574, 576, 580,		Cross v. his Creditors,	88
	585	Crow v. Weir,	335
Coventry v. Coventry,	204	Cruikshank v. British Linen Co.,	245
Coventry v. Hutchison,	275	Cruikshank v. Williams,	758
Cowan v. Key,	445	Cruikshanks v. Mitchell,	460
Cowan v. Ramsay,	96	Cruikshank's Trustees v. Cruikshank,	832
Cowie v. Brown,	902	Crum and Co. v. Maclean,	386
Craick v. Napier,	114	Cullen v. Thomsons,	40
Craig v. Edgar,	319	Cullen and Company v. Philip,	145
Craig v. Edinburgh and Leith Glass Co.,	310	Culross v. Geddes,	566
Craig v. Fleming,	775	Cultie v. Earl of Airly,	287
Craig v. Hopkin,	205, 601	Cuming v. Cuming,	598
Craig v. Richardson,	43	Cuming v. Gordon,	953
Craigie v. Craigie,	954	Cuming v. Kennedy,	64
Craigie v. Graham,	250, 273	Cuming v. Maconochie,	1030
Craigie v. Kerr,	1029	Cuming v. Presbytery of Aberdeen,	70
Craigie v. Scobie,	434	Cuming's Trustees v. Cuming,	978
Craik v. Craik,	820	Cumming v. Irvine,	657
Cranston v. Cranston,	131	Cumming v. King's Advocate, <i>Liferent</i>	
Cranston v. Scot's Creditors,	645	and <i>Fee</i> ,	780
Cranston v. Wilkison,	779	Cumming v. King's Advocate, <i>Terce</i> ,	795
Cranstoun v. Bontine,	171	Cumming v. Munro,	180
Craven v. Elibank's Trustees,	109, 115	Cuningham v. Hamilton,	1102

INDEX OF CASES.

1261

	PAGE		PAGE
Cunningham v. Spence,	47	Davidson v. Robertson,	436
Cuninghame,	970	Davidson v. Town of Edinburgh,	131
Cuninghame v. Cuninghame (1770),		Davie v. Denny,	1031
<i>Heir of Conquest,</i>	992	Davies,	108
Cuninghame v. Lady Semple,	84	Davis v. Mason,	140
Cuninghamhead v. Town of Lanark,	71	Dawson v. Muir,	157
Cunningham v. Cunningham,	870	Dawson and Mitchell v. Magistrates of	
Cunningham v. Home,	348	Glasgow,	739
Cunninghame v. Cunningham (1810),		Deas v. Ayton,	372
<i>Heir of Marriage,</i>	819	Delvalle v. Creditors of York Building Co.,	166
Cunninghame v. Cunningham (1821),		Dempster v. Potts,	421
<i>Interest,</i>	247	Dempster v. Willison,	35
Cunyngham v. Cunyngham (1852), <i>Im-</i>		Denham v. Denham,	955
<i>perfect Entail,</i>	937	Denniston v. Semple,	248
Cunynghame v. Cunynghame (1804),		Denniston, Macnair and Company v.	
<i>Marriage-Contract,</i>	817	Macfarlane,	384, 552
Cunynghame v. Whiteford,	114	Dennistoun v. Campbell,	612
Currence v. Hackett,	76	Dennistoun v. Crichton,	1019
Cust v. Jarbet and Company,	300	Dennistoun v. Mudie,	113
Cuthbertson v. Bain,	1063	Dewar v. Aitken,	206
Cuthbertson v. Pollock,	849	Dewar v. Betson,	40
Cuthbertson v. Thomson,	781	Dewar v. Dewar,	937
Cuthil v. Wright,	913	Dewar v. Millar,	385
Cutler v. Littleton,	347	Dewar v. Ross's Trustees,	890
		Dick v. Cuthbertson,	660
DALGARNO v. LAIRD OF COLQUHOUN,	327	Dick v. Dick (1676), <i>Arrestment,</i>	520
Dalglish and Fleming v. Sorley,	385	Dick v. Dick (1812), <i>Construction,</i>	961
Dalhousie v. Maule,	941	Dick v. Donald and Cuthbertson,	661
Dalkeith, Earl of, v. Book,	84	Dick v. Earl of Abercorn,	566
Dall v. Countess of Southesk,	125	Dick v. Ferguson,	907
Dallas v. Paul, <i>Notary,</i>	40	Dick v. Gillies,	889, 890
Dallas v. Paul, <i>Heir's Signature,</i>	182	Dick v. Goodall and Company,	519
Dalrymple v. Bruce,	597	Dick v. Oliphant,	104
Dalrymple v. Murray,	896	Dick's Trustees v. Purdie,	906
Dalyell v. Dalyell (1809), <i>Entail, Fetters,</i>	951	Dickie v. Gutzmer,	453
Dalzell v. Dalzell (1810), <i>Entail by Ad-</i>		Dickie v. Thomson,	268
<i>judger,</i>	941	Dickson v. Bonar's Trustees,	895
Dalziel v. Scotstarbet,	138	Dickson v. Cunningham,	614
Dalziell v. Henderson and Dalziell,	933	Dickson v. Dickson (1855), <i>Aberdeen Act</i>	
Darleith v. Campbell,	794	<i>Jointure,</i>	829
Darling v. Mein,	811	Dickson v. Dicksons (1851), <i>Entail, Chil-</i>	
Darlington v. Hamilton,	248	<i>dren's Provisions,</i>	826
Davidson v. Campbell's Creditors,	464	Dickson v. Halbert,	156, 202, 328
Davidson v. Charteris,	47	Dickson v. Lord Elphinstone,	732
Davidson v. Davidson,	869	Dickson v. Magistrates of Dumfries,	1074
Davidson v. Davidson and Weir,	181	Dickson v. Shirreff,	371
Davidson v. Gibb,	199	Dickson v. Syme, <i>Sasine,</i>	615
Davidson v. Hamilton, <i>Marriage-Contract,</i>	799	Dickson v. Syme, <i>Unrecorded Entail,</i>	965
Davidson v. Hamilton, <i>Minor,</i>	113	Dickson v. Turner,	248
Davidson v. Kerr,	676	Dickson and Heriot v. Logan,	56
Davidson v. Macgregor,	144	Dickson's Trustees v. Goodall,	608
Davidson v. M'Kenzie,	886	Dillon v. Campbell,	941
Davidson v. M'Leod,	611	Dimmack v. Dixon,	229
Davidson v. Murray,	522	Dimpsey v. Dalrymple,	230
Davidson v. Oswald,	353	Din v. Gillies,	46

	PAGE		PAGE
Dingwall v. Monro,	132	Downie v. Campbell,	113
Dinwoodie v. Johnston,	432	Downie v. M'Killip,	105
Disbrow v. Macintosh,	87	Dreghorn v. Hamilton,	701
Disher v. Kidd,	434	Drew v. Drew,	368
Dixon v. Bovill,	229	Drew v. Lumsden,	501
Dixon v. Campbell,	354	Dronnan v. Montgomery,	57
Dixon v. Dixons (1831), <i>Company</i> ,		Drover v. Maxwell,	778
<i>Winding-up</i> ,	384	Drummond v. Campbell,	438
Dixon v. Dixons (1836), <i>Conditio si sine</i>		Drummond v. Drummond,	868
<i>liberia</i> ,	921	Drummond v. First Fife Banking Com-	
Dixon v. Fisher,	564	<i>pany</i> ,	310
Dixon v. Lawther,	1031	Drummond v. Mackenzie,	933
Dixon v. Monkland Canal Company,	156	Drummond v. Muschet,	283, 293
Dixon and Douglas v. Thomson,	511	Drummond v. Ramsay,	624
Dobbie and Company v. Nisbet,	525	Drummond v. Stuart,	530
Doig v. Ker,	53, 55	Drysdale v. Johnstone,	265
Don v. Kealey,	471	Du Bost v. Beresford,	137
Don v. Waldie,	610	Duff v. Brodie,	567
Don v. Watt,	434	Duff v. Gorrie,	122
Donaldson v. Donaldson (1749), <i>Blanks</i>		Duff v. Grant,	144
<i>in Writs</i> ,	227	Duff v. Magistrates of Elgin,	740
Donaldson v. Donaldson (1770), <i>Arbitra-</i>		Duffs v. Duff,	240
<i>tion</i> ,	364	Duffus v. Mackay,	413
Donaldson v. Fulton,	346	Duguid v. Dundas,	905
Donaldson v. Milne,	458	Dumbar v. Williamson,	719
Donaldson v. Ord,	303	Dumfries, Kirk-Session of, v. Kirk-	
Dougall v. Gordon,	301, 303	<i>Sessions of Kirkcudbright and Kelton</i> ,	146
Dougall's Trustees v. Dougall,	898	Dunbar v. Bishop of Murray,	179
Douglas,	154, 893	Dunbar v. Earl of Dundee,	248
Douglas v. Allan,	867	Dunbar v. Hay,	236
Douglas v. Douglas,	822, 823	Dunbar v. Remington, Wilson and Co.,	385
Douglas v. Douglas's Trustees,	180	Dunbar v. Vassals of Muchrome,	181
Douglas, Duke of, v. Littlegil's Creditors,	48	Dunbar's Creditors v. Abercromby,	1078
Douglas v. Dunlop and Company,	624, 1077	Dunbar's Creditors v. Grant,	169, 279
Douglas v. Glassford,	950	Dunbar's Heirs,	993
Douglas, Heron and Company v. Clerk,	54	Dunbar's Trustees v. Dunbar,	910
Douglas, Heron and Company v. Grant's		Duncan v. Bruce,	61
<i>Trustees</i> ,	478	Duncan v. Houston,	508
Douglas, Heron and Company v. Hair,	406	Duncan v. Lord Clerk Register,	219
Douglas, Heron and Company v. Rich-		Duncan v. Raes,	809
<i>ardson</i> ,	478, 479	Duncan v. Sloss,	168, 840
Douglas, Heron and Company v. Rid-		Duncan v. Thomson,	146
<i>dick</i> ,	262, 265, 266	Duncan v. Trustees of River Clyde,	331
Douglas v. M'Michael,	238	Dundas v. Baikie,	598
Douglas, Marquis of, v. Sommervill,	425	Dundas v. Campbell,	728
Douglas v. Mason,	519	Dundas v. Dennistoun,	625
Douglas v. Stewart,	964	Dundas v. Drummond,	641
Douglas v. Torthorell,	700	Dundas v. Dundas (1829), <i>Approbate</i>	
Douglas v. Wallace,	511	<i>and Reprobate</i> ,	870
Douglas's Trustees v. Douglas,	440	Dundas v. Dundas (1837), <i>Executor</i> ,	865
Douglass v. Somervels,	999	Dundas v. Dundas (1837), <i>Uncertainty</i>	
Doves v. Smith,	900	<i>of Will</i> ,	912
Dow v. Beith,	182	Dundas v. Dundas (1839), <i>Alien</i> ,	134
Dowglas v. Dowglas,	903	Dundas v. Lewis,	903
Downie v. Alexander,	563	Dundas v. Lord Dundas,	1019

INDEX OF CASES.

1263

	PAGE		PAGE
Dundas v. Murray,	973	Edinburgh, Treasurer of, v. Coheirs of	
Dundas v. Nicolson,	599	Sheina,	599
Dundas v. Ogilvie,	238	Edmond v. Blaikie,	931
Dundee, Magistrates of, v. Kid,	1056	Edmond v. Magistrates of Aberdeen,	304,
Dundee, Magistrates of, v. Morris,	67		716
Dunfermline, Earl of, v. Earl of Cal-		Edmonstone v. Edmonstone,	949
lender, <i>Holograph, Date,</i>	75	Edward v. Fyfe,	458
Dunfermline, Earl of, v. Earl of Cal-		Eglinton, Earl of,	985
lender, <i>Fee,</i>	778	Eglinton, Earl of, v. Lord Montgomerie	
Dunfermling, Lady, v. The Earl,	809	(1842), <i>Entail Unrecorded,</i>	964
Dunlop v. Baillie,	886	Eglinton, Earl of, v. Lord Montgomerie	
Dunlop v. Cochrane,	1029	(1842), <i>Second Entail,</i>	968
Dunlop v. Crawford (1812), <i>Conditional</i>		Eglinton, Earl of, v. Lord Montgomerie	
<i>Institution,</i>	858, 921	(1845), <i>Entail Prohibitions,</i>	954
Dunlop v. Crawford (1850), <i>Title,</i>	661	Elams v. Fisher,	268
Dunlop v. Crookshanks,	157	Elders v. Allan,	514
Dunlop v. Dunlop,	77, 80	Elder v. Marshall,	482
Dunlop v. Greenlees' Trustees,	37, 225	Elder v. Young and Co., <i>Bill, Protest,</i>	467
Dunlop v. Hamilton and Company,	446	Elder v. Young and Co., <i>English Pro-</i>	
Dunlop v. Marshall,	1073, 1082	<i>test,</i>	471
Dunmore Coal Company v. Youngs,	184	Eleis v. Englistoun,	102
Dunmore, Earl of, v. M'Inturner,	357, 363	Eleis v. Keith,	1094
Durham's Trustees v. Graham (1798),		Elgin, Earl of, v. Wellwood,	954
<i>Precept of Clare Constat,</i>	1015	Elibank, Lord, v. Campbell, <i>Entail, Con-</i>	
Durham's Trustees v. Graham (1800),		<i>solidation,</i>	731
<i>Warrandice,</i>	207, 668	Elibank, Lord, v. Campbell, <i>Irritant</i>	
Durie v. Coutts,	873, 889	<i>Clause,</i>	958
Dury and Doig v. Dury,	35, 224	Elibank, Lord, v. Campbell, <i>Service,</i>	1015
Duthie v. Carnegie,	414	Elibank v. Pentland,	176
Duthie v. Duthie,	978	Elies,	719
Dykes and Boyd v. Boyds,	781	Eliot's Creditors v. Eliot,	778
Dykes v. Dykes,	993	Elliot v. Elliot,	986
		Elliot v. Faulke,	61
EADIE v. MACKINLAY,	410	Elliot and Son v. Faulke,	444
Earnshaw's Creditors v. Douglasses,	779	Elliots v. Riddel,	41
East Lothian Bank v. Turnbull,	310	Eliott v. Heirs of Stobs,	953, 959
Edgar v. Craigmillar's Heirs,	234	Eliott v. Pott,	954
Edgar v. Johnstone,	820	Elphinstone v. Lord Blantyre,	205
Edgar v. Maxwell,	1014	Erskine (1710), <i>Registration for Preser-</i>	
Edinburgh Correspondent Newspaper,	375	<i>vation,</i>	212
Edinburgh Gas Light Company v.		Erskine (1852), <i>Citation of Tutor,</i>	116
Clyne,	353	Erskine v. Earl of Mar, <i>Entailer's Debt,</i>	967
Edinburgh Gas Light Company v. Tay-		Erskine v. Earl of Mar, <i>Provisions,</i>	980
lor,	584	Erskine v. Erskine,	198
Edinburgh and Glasgow Bank v. Sam-		Erskine v. Manderson,	274
son, <i>Alteration on Bill,</i>	473	Erskine v. Thomson,	458
Edinburgh and Glasgow Bank v. Sam-		Erskine v. Wallace,	598
son, <i>Bank Draft,</i>	490	Erskine's Trustees v. Heirs of Entail,	887
Edinburgh Glass House Company v.		Ettles v. Robertson,	481
Shaw,	347	Ewan v. Watt,	855
Edinburgh, Magistrates of, v. Hors-		Ewart v. Cutler,	263
burgh,	1059	Ewen or Grahame v. Ewen's Trustees,	165,
Edinburgh, Magistrates of, v. Howat,	739		324
Edinburgh, Magistrates of, v. Sibbald's		Ewen or Grahame v. Magistrates of	
Creditors,	585	Montrose,	202, 228

	PAGE		PAGE
Ewing v. Cumine,	478	Fife, Earl of, v. Duff (1828), <i>Entail</i> ,	2
Ewing and Co. v. Dewar,	363, 365	<i>Alteration of Succession</i> ,	2
Ewing, May, and Company v. John-		Fife, Earl of, v. Mackenzie,	56
stone,	525	Fife, Trustees of Earl of, v. Cumming,	52
Ewing v. Lennox,	562	Findlater, Countess of, v. Earl of Sea-	
Ewing v. Semple,	57	field,	88, 81
FAIR v. CRANSTOUN,	435	Findlay,	57
Fairholm v. Cockburn,	458	Findlay v. Donaldson's Trustees,	24
Fairholms,	453	Findlay v. Macintosh,	77
Fairlie v. Cunningham,	959	Finlay v. Birkmire,	89
Fairlie v. Fairlie,	236	Finlayson v. Finlayson,	112, 77
Fairly, Creditors of, v. his Heirs,	235	Finlayson v. Monro,	96
Fairservice v. White,	997	Finlayson v. Smith,	250, 275
Fairweather v. Alison,	477	Finlaw v. Earl of Northesk,	291
Fairy v. Craigdarroch,	347	Fisher v. Colquhoun,	332
Falconar v. M'Leod, <i>Homologation</i> ,	178	Fisher v. Dickson,	355
Falconar v. M'Leod, <i>Marriage Con-</i>		Fisher v. Dixon,	843
tract,	850	Fisher and Hepburn v. Syme,	259
Falconer v. Beattie's Heirs (1627), <i>For-</i>		Fisher v. Stewart,	254
<i>reign</i> ,	83	Fleet v. Strang,	263
Falconer v. Beattie's Heirs (1628), <i>Per-</i>		Fleeming,	985
<i>sonal Bond, when Heritable</i> ,	239	Fleming v. Baird,	561, 562
Falconer v. Moncreiff,	823	Fleming v. Brown,	924
Falconer v. Thomson,	351	Fleming v. Craig,	907
Falconer v. Westland,	164, 202	Fleming v. Harley's Trustees,	660
Falconer v. Wright,	825, 826	Fleming v. Lord Elphinstone,	940
Falls v. Porterfield,	446	(cited under name Lord Elphinstone.)	
Farmers v. Myles,	54	Fleming v. Robertson,	191
Farquhar v. Hair,	562	Fleming v. Scott,	476
Farquhar v. M'Kain,	249	Fleming v. Thomson,	339
Farries v. Smith,	467	Fleming v. Twaddle,	384, 514
Faulds v. Corbet,	676	Fleming v. Wilson (1823), <i>Discharge</i>	
Fenton v. Skinner,	853	<i>of Cautioner</i> ,	338, 341
Ferguson v. Ferguson,	937	Fleming v. Wilson and M'ellan (1827),	
Ferguson v. M'Kenzie,	347	<i>Prorogation of Submission</i> ,	364, 365
Ferguson v. Macpherson,	345	Fleming v. Young,	86
Ferguson v. More,	293	Flowerdew,	893
Ferguson's Trustees v. Hamilton,	783, 923	Fogo v. Fogo,	788, 1022
Fergusson v. Bethune,	482, 483	Foord v. Foord,	138
Fergusson v. Graham,	379	Forbes v. Alison,	508
Fergusson v. Malcolm,	446	Forbes v. Bean,	151
Fergusson v. Skirving,	93	Forbes v. Dickson,	347
Fergusson and Co. v. Belah,	460, 462	Forbes v. Dunbar,	267
Ferrie v. Baird,	886	Forbes v. Duncan,	1103
Ferrie v. Ferrie's Trustees,	43, 904	Forbes v. Earl of Galloway's Trustees,	865, 878
Ferrie v. Mitchell,	349	Forbes v. Forbes,	903
Ferrier v. Alison,	361	Forbes v. Gallie,	518
Ferrier v. Gartmore's Creditors,	957	Forbes, Lord, v. Garrioch,	688
Ferrier v. Graham's Trustees,	204	Forbes v. Maitland,	1016
Fetterneer, Laird of, v. Semple,	138	Forbes v. Udney,	568
Fife, Earl of, v. Duff (1819), <i>Subscrip-</i>		Forbes v. Welsh,	340
<i>tion by Blind</i> ,	44	Forbes' Trustees v. Gordon's Assignees,	1063
Fife, Earl of, v. Duff (1825), <i>Instrument-</i>		Forbes' Trustees v. Macintosh,	601
<i>ary Witnesses</i> ,	49, 52	Forbes and Co. v. Lord Duncan,	333, 967
		Forbes and Co., v. Macnab,	454

INDEX OF CASES.

1265

	PAGE
Fordyce v. Bridges,	518
Forman v. Burns,	1045
Forrest v. Veitch,	47
Forrester v. Hutchison,	550, 995
Forrester v. Walker, <i>Cash-Credit Bond,</i>	255
Forrester v. Walker, <i>Inducia,</i>	504
Forrester and Macgregor v. Forrester's Trustees,	777, 779
Forster v. Orr's Trustees,	381
Forsyth v. Durie,	567
Forsyth v. Hare and Co.,	501; 503
Forsyth v. Wishart,	341
Forsyth's Trustees v. Maclean,	916
Forth and Clyde Navigation Company v. Wilson and Company,	571
Fortoun v. Shewan,	83
Fotheringham v. Fotheringham,	822
Fotheringham v. Ogilvy,	820
Foulds v. Thomson,	148
Frank v. Frank,	50, 51
Fraser (1835), <i>Montgomery Improvements, Notice,</i>	986
Fraser (1837), <i>Trust Winding-up,</i>	907
Fraser (1840), <i>Montgomery Improvements,</i>	985-987
Fraser (1841), <i>Montgomery Improvements,</i>	985
Fraser (1845), <i>Factor loco tutoris,</i>	108
Fraser (1857), <i>Tutor-at-Law, Powers,</i>	112
Fraser v. Bannerman,	442
Fraser v. Black and Knox,	176, 177
Fraser v. Brown,	785
Fraser v. Fraser,	68
Fraser, Reid, and Sons v. Lancaster and Jameson,	503
Fraser v. Ranken,	843
Fraser v. Rose,	139
Fraser v. Urquhart,	479
Fraser v. Williamson,	349
Fraser v. Wilson,	729
Fraser v. Wright,	361
Fraser's Trustees v. Chisholm,	1069
Frazer v. Frazer,	833
Freebairn v. Grant,	128
Freer v. Richardson and Company,	472
Friend,	136
Frith v. Buchanan, Hamilton, and Co.,	1044
Frog's Creditors v. his Children,	780
Fullarton v. Hamilton,	684
Fullerton v. Denholm,	1055
Fulton v. Johnston,	647
Fulton v. Macalister,	892
Fyfe v. Bean,	433
Fyfe's Trustees v. Carter,	286, 447
Fyfe v. Fyfe,	921, 923

	PAGE
GAIRDNER v. HEIRS OF EARL OF DUN-NIPACK,	957
Gairns v. Sandilands,	778
Galbraith v. Graham,	724
Galbraith v. Warden,	465
Galletly v. Macfarlane,	39
Gallie v. Ross,	263
Galloway,	868
Gammell,	234
Gammell v. Cathcart, <i>Precept of Sasine,</i>	603
Gammell v. Cathcart, <i>Clauses of Entail,</i>	946
Gammell v. Commissioners of Woods and Forests,	568
Garden v. Gregory,	274
Garden v. M'Coll,	508
Gardiner v. Anderson,	645
Gardiner's Executrix v. Bennet,	199
Gardner v. Ewing,	367
Gardner v. Grant,	142
Gardner v. Scotts,	640, 683
Gardner v. Smith,	346
Gardner v. Trinity House of Leith,	703
Gardyne v. Royal Bank,	1067
Garnock, Viscount, v. Duke of Queensberry,	438
Garnock, Viscount, v. Master of Garnock,	966
Gavin v. Kippen and Company,	447
Gaywood,	219
Gaywood v. M'Keand,	58
Geddes,	852
Geddes v. Wallace,	380
Gentle v. Maclellan,	348
Gerran v. Alexander,	782
Gibb,	968, 969
Gibson v. Arbuthnott,	826
Gibson v. Gibson,	487
Gibson v. Howie,	43
Gibson v. Soot,	688
Gibson v. Walker,	65
Gibson-Craig v. Aitken,	405
Gibson-Craig v. Cochrane, <i>Entry by Liferenter,</i>	1052
Gibson-Craig v. Cochrane, <i>Registration of Sasine,</i>	625
Gibson-Craig v. Cochrane, <i>Superior's Title,</i>	689, 1069
Gifford v. Gifford,	421
Gilbert v. Sykes,	137
Gillespie v. Donaldson's Trustees,	79
Gillespie v. Gillespie,	118, 904
Gillespie v. Robertson,	878, 933
Gillespie's Real Creditors v. his Personal Creditors,	1069
Gillies v. M'Lachlan's Representatives,	150

	PAGE		PAGE
Gillow and Company v. Burgess,	88	Gordon v. Mosse,	96
Gilmour v. Finnie, <i>Caution, Suspension</i> ,	255	Gordon v. Murray,	36, 4
Gilmour v. Finnie, <i>Assignment</i> ,	273, 276	Gordon v. Pitaligo,	19
Gilmour v. Gordon,	961	Gordon v. Ross,	82
Gilmour v. Hunter,	973	Gordon v. Sloss,	42
Gilmour's Trustees v. Gilmour,	106	Gordon v. Stephen,	46
Glas v. Stewart,	1072, 1074	Gordon v. Sutherland (1748), <i>Children's Provisions</i> ,	821
Glasgow, Barrhead, and Neilston Railway Co. v. Nitshill Coal Co.,	372	Gordon v. Sutherland (1761), <i>Bill</i> ,	475
Glasgow, Earl of,	985	Gordon v. Trotter,	325
Glasgow, Tailors of, v. Blackie,	688	Gordon v. Tyrie,	263
Glasgow, Weavers of, v. Weavers of Calton,	140	Gordon, Duke of, v. Leslie,	336
Glass v. Macintosh,	327	Gordon's Trustees v. Eglinton, <i>Registration of Sasine</i> ,	610
Glen v. Black,	506	Gordon's Trustees v. Eglinton, <i>Trust, Survivorship</i> ,	878
Glen v. Dundas,	141	Gordon's Trustees v. Harper,	312, 923
Glen v. Peacock,	950	Gordonston and Nicolson v. Paton,	600, 670
Glencairn, Countess of, v. Cunningham,	810	Gormock, Laird of, v. The Lady,	43
Glendinning and Gaunt v. Walker,	921	Govan v. Boyd,	84
Glendinning's Creditors v. Montgomery,	461	Govan v. Setons,	869
Glendonwyne v. Gordon,	567	Gowans v. Duncan,	365
Globe Insurance Company v. Mackenzie,	883	Gowans' Trustees v. Carstairs,	187
Globe Insurance Company v. Scott's Creditors,	521	Graham,	110
Glover v. Brough,	863, 868	Graham v. Cuthbertson,	323
Goddard v. Stewart's Children,	831, 832	Graham v. Denniston,	911
Goldie v. Macdonald,	425	Graham v. Earl of March,	110
Goldie v. Napier,	244	Graham v. Frier,	246
Goldsmid and Moxon v. Macneil, Stewart, and Company,	464	Graham v. Graham,	1026
Goodsir v. Carruthers,	155, 893	Graham v. Graham's Trustees,	887
Gordon,	906	Graham v. Hope,	921
Gordon v. Abernethy,	367	Graham v. Hunter's Trustees,	896, 1085
Gordon v. Anderson,	447	Graham v. Leny,	452
Gordon v. Bogle,	479, 480	Graham v. Little,	511
Gordon v. Campbell,	147	Graham v. Lord Lynedoch's Trustees,	977
Gordon v. Cheyne,	167, 891	Graham v. Macleod,	46
Gordon v. Crawford,	160	Graham v. Pollock,	147
Gordon v. Earl of Fife,	610	Graham v. Stansfield's Creditors,	76
Gordon v. Farquhar,	129	Graham v. Veitch,	337
Gordon v. Gordon (1749), <i>Entail, Contravention</i> ,	973	Graham v. Westenra,	701
Gordon v. Gordon (1791), <i>Service</i> ,	180, 1023	Graham's Creditors v. Grierson,	55
Gordon v. Gordon (1832), <i>Wife's Capacity</i> ,	124	Graham's Creditors v. Hyslop,	553
Gordon v. Gordon's Trustees,	939, 968	Grahame v. Bannerman,	1033
Gordon v. Grant,	560, 563	Grahame v. Gillespie and Company,	473
Gordon v. Keith,	239	Grahame v. Hunter,	956
Gordon v. King's Advocate,	973	Grahame v. Marquis of Montrose,	48
Gordon v. Maitland (1757), <i>Penalty in Bond</i> ,	242	Grahame v. Shand,	964
Gordon v. Maitland (1761), <i>Delivery of Deed</i> ,	99	Grahame v. Stevenson's Creditors,	138
Gordon v. Milne,	1115	Grant,	127
Gordon v. Monteith,	365	Grant v. Anderson (1706), <i>Homologation</i> ,	179
		Grant v. Anderson (1840), <i>Children's Provisions</i> ,	853
		Grant v. Campbell (1760), <i>Resignation ad remanentiam</i> ,	728
		Grant v. Campbell (1818), <i>Assignment</i> ,	288

INDEX OF CASES.

1267

	PAGE		PAGE
Grant v. Fenton,	267	Haldane v. De Maria,	142
Grant v. Girdwood and Company,	363	Haldane v. Earl Marischall,	423
Grant v. Grant (1718), <i>Trustee's Title</i> ,	925	(cited under name Keith.)	
Grant v. Grant (1757), <i>Conquest</i> ,	992	Haldane v. Haldanes,	1014
Grant v. Grant's Trustees,	1025	Haldane v. Ker,	55
Grant v. Keir,	55	Halket v. Earl of Elgin,	364
Grant v. Richardson's Representatives,	186	Hall v. Whillie,	567
Grant v. Stoddart (1830), <i>Deletion</i> ,	69	Halley v. Gowans,	878
Grant v. Stoddart (1849), <i>Erasure</i> ,	67	Haltoun, Lord, v. Earl of Northesk,	133
Grant v. Stoddart (1849), <i>Revocation</i> ,	900	Halyburton v. Cook,	332
Grant v. Strachan,	249	Halyburton v. Rutherford,	175
Grassick v. Farquharson,	435	Halyburtons v. Graham,	338
Gray,	604	Hamilton, <i>Heir of Entail</i> ,	951
Gray v. Cockburn,	910	Hamilton, <i>Tutor ad litem</i> ,	963
Gray v. Earl of Selkirk,	296, 303	Hamilton, Duke of,	983
Gray v. Gordon,	239	Hamilton, Duke of, v. Baillie,	1053
Gray v. Hamilton,	562	Hamilton, Duke of, v. Bentley,	571
Gray v. Kennedy (1751), <i>Interdiction</i> ,	132	Hamilton, Duke of, v. Douglas,	996
Gray v. Kennedy (1819), <i>Trustees' Liability</i> ,	896	Hamilton, Duke of, v. Earl of Selkirk,	992
Gray v. Lord Ross,	452	Hamilton, Duke of, v. Mather,	590
Gray, Lord, and Others,	154, 893	Hamilton, Duke of, v. Waring,	137
Gray v. Smith and Bogle,	731, 823	Hamilton, Creditors of Duke of, v. Trustees of Duchess,	749
Gray v. Thomson,	274	Hamilton v. A Dumb Man in Glasgow,	130
Gray v. Walker, <i>Jus Mariti</i> ,	240	Hamilton v. Bogle,	702
Gray v. Walker, <i>Bond Fide Payment</i> ,	330	Hamilton v. Boswell,	794
Greenhill v. Aitken,	833, 848	Hamilton v. De Gares,	136
Greenock Bank v. Garrock,	197	Hamilton v. Dunn,	1059
Greenock Banking Company v. Smith,	325	Hamilton v. Hamilton (1681), <i>Condition as to Marriage</i> ,	138
Greenock v. Greenock,	992	Hamilton v. Hamilton (1710), <i>Service to Institute</i> ,	1023
Grey v. Hope,	625	Hamilton v. Hamilton (1837), <i>Conditio si sine liberis</i> ,	922
Grier v. Maxwell,	288	Hamilton v. Hamilton (1857), <i>Aberdeen Act Annuity</i> ,	802
Grierson v. Earl of Sutherland,	440	Hamilton v. Kinnear and Sons,	474
Grierson v. Grierson,	46	Hamilton v. Macdowal, <i>Dispositive Words</i> ,	548
Grierson v. Miller,	874	Hamilton v. Macdowal, <i>Entail at Common Law</i> ,	936
Grierson v. Ramsay,	519, 750, 924	Hamilton v. Marahall,	246
Grierson v. Telfer,	131	Hamilton v. Monteath,	474
Grieve v. Williamson,	1060	Hamilton v. Roger,	1082
Grieve v. Wilson,	158	Hamilton v. Russell,	146
Grindlay v. Hill,	1055	Hamilton v. his Sisters,	102
Grindlay v. Merchant Co. of Edinburgh,	856	Hamilton v. Struthers,	90
Grosat v. Cunningham,	360	Hamilton v. Viscountess Oxford,	954
Grott v. Sutherland,	248	Hamilton v. Watson,	163
Guthrie v. Cowan,	841, 850	Hamilton v. Western Bank, <i>Essential Error</i> ,	652
Guthrie v. Munro,	200	Hamilton v. Western Bank, <i>Articles of Roup</i> ,	678
Guthries,	765	Hamilton v. Wright,	184
HADDEN v. BARR,	108	Hamilton, Littlejohn v.	751
Hadden and Lauder v. Shorswood,	102	Hamilton's Creditors,	774
Hadinton v. Richardson,	517		
Haig v. Forbes,	1055		
Haig v. Haig, <i>Date of Sasine</i> ,	607		
Haig v. Haig, <i>Discharge by Heir</i> ,	820		
Haig v. Haig, <i>Sasine de novo</i> ,	626		
Halbert v. Dickson,	919		

	PAGE		PAGE
Hamiltons v. Hope,	233	Henderson v. Somerville,	84
Hamilton, Magistrates of, v. Hart's Trustees,	1055	Henderson and Others v. Steuart ,	51
Handyside v. Cobbin and Lee,	521	Henderson v. Stewart,	4
Hannah or Thomson v. Cross,	125	Henderson v. Wilson,	3
Hannah's Legatees v. Guthrie,	916	Hendry's Trustees v. Renton and Co. ,	35
Hannay v. Creditors of Bargaly,	562	Henry v. Grant,	95
Hannay v. Stothert,	676	Henry v. Watt,	96
Hardie v. Hardie,	54	Hepburn v. Brown,	851
Harkness v. Graham, <i>Homologation</i> ,	181	Hepburn v. Duke of Gordon,	561
Harkness v. Graham, <i>Quadiennium Utile</i> ,	116	Hepburn of Humble v. his Father ,	55
Harris v. Churchill,	325	Hepburn v. Laird of Waughton,	43
Harrowar's Trustees v. Erskine,	571	Hepburn v. Naysmith,	178
Harvey v. Calder,	520	Hepburn v. Scotts,	102
Harvey v. Chessel's Trustees,	123	Hepburn and Somerville v. Campbell ,	157
Harvey v. Gibsons,	358	Hepburn of Humble v. Creditors of his Children,	257
Harvey, Hall, and Co. v. Black and Son,	516	Heriot v. Bird,	176
Harvie v. Macintyre,	345	Heriot's Hospital, Governors of, v. Ferguson,	581
Hassett v. Walker,	508	Heron v. Duke of Queensberry,	724
Hastings, Marchioness of, v. Executors of Marquess,	1043	Heron v. Syme,	616
Hastings, Marquess of, v. Oswald,	1053	Herries,	469
Hawkins v. Hawkins,	750	Herries, Farquhar, and Co., v. Brown,	832
Hawkins v. Jackson,	158		834
Hay v. Binny,	893	Hill v. College of Glasgow,	407, 519
Hay v. Crawford,	996	Hill v. Duke of Montrose,	1051
Hay v. Cumming,	126	Hill v. Hill,	99
Hay v. Grant,	329	Hill v. Lindsey,	300, 304
Hay v. Hay (1758), <i>Service</i> ,	1016	Hill v. Mackay,	1055
Hay v. Hay (1788), <i>Lawful Heirs-Male</i> ,	994	Hill v. Menzies and Anderson's Trustees,	464
Hay v. Hay (1851), <i>Entail, Prohibition</i> ,	961	Hill v. Merchant Co. of Edinburgh,	1056
Hay v. Horn,	445	Hill v. Mitchell,	906
Hay v. Mair,	385	Hislup v. Duke of Buccleuch,	973
Hay v. Marshall,	1100	Hog v. Hog, <i>Exclusion of Legitim</i> ,	841, 873
Hay v. Panton,	662	Hog v. Hog or Lashley, <i>Discharge of Legitim</i> ,	842
Hay v. Sinclair,	383	Hog v. M'Lellan,	506
Hay v. Wood,	138	Hogg v. Brack,	333
Heddrington v. Book,	423	Hogg v. Campbell and Others,	49, 50
Heggie and Co. v. Stark,	357	Hogg v. Low,	263
Henderson v. Birnie,	226	Hoggan or Smith v. Ranken,	627
Henderson v. Campbell,	1084	Hollinworth v. Dunbar,	421
Henderson v. Duthie,	465	Holman v. Johnson,	145
Henderson v. Graham,	511	Holmes and Campbell v. Cunningham,	962, 966, 968
Henderson v. Hay,	474		98
Henderson v. Henderson, <i>Entail, Fetters</i> ,	950	Holwell v. Cumming,	98
Henderson v. Henderson, <i>Liferent and Fee</i> ,	778	Home v. Creditors of Eyemouth,	1098
Henderson v. Ker (1829), <i>Bill</i> ,	462	Home v. Dickson,	49
Henderson v. Ker (1832), <i>Messenger-at-Arms</i> ,	152	Home v. Earl of Home,	152
Henderson v. Mackenzie,	1052	Home v. Home,	931
Henderson v. Magistrates of Glasgow,	268	Home v. Purves,	440, 477
Henderson v. Murray,	90	Home v. Scot,	349
Henderson v. Selkirk,	84	Home v. Smith,	701, 1069
		Hope v. Dalrymple,	995

INDEX OF CASES.

1269

	PAGE		PAGE
Hope v. Dickson,	813	Hyslop v. Maxwell's Trustees, <i>General</i>	
Hope v. Hope,	659, 687	Disposition,	874
Hope v. Moncreiff,	677, 981, 1074	Hyslop v. Maxwell's Trustees, <i>Liberal</i>	
Hope and M'Caa v. Wauch,	294	Interpretation,	908
Hopetoun, Earl of,	569	Hyslop v. Shaw,	591
Hopetoun, Earl of, v. Scots Mining Com-			
pany, <i>Decree-Arbitral, Authentica-</i>	94	INGLIS v. ANSTRUTHER,	207
tion,		Inglis v. Boswell,	169
Hopetoun, Earl of, v. Scots Mining Com-		Inglis v. Hamilton,	177
pany, <i>Delivery,</i>	104	Inglis v. Inglis,	968
Hopetoun, Earl of, v. Scots Mining Com-		Inglis v. Miller,	921
pany, <i>English Decree-Arbitral,</i>	370	Inglis v. Wiseman's Representatives, 442,	487
Hopetoun, Earl of, v. Scots Mining Com-		Inglis and Weir v. Renny,	242
pany, <i>Pages of Deed,</i>	60	Ingram v. Stevenson,	48
Hopkirk v. Campbell,	364	Innes v. Baroness Mordaunt,	954
Horn v. Duncanson,	108	Innes v. Downie,	566
Horne v. Breadalbane's Trustees,	644	Innes v. Earl of Fife,	627
Horsburgh v. Horsburgh,	483	Innes v. Gordon (1732), <i>Acceptance of</i>	
Horsburgh v. Bethune,	914	Bill,	445
Horsburgh v. Hyalop,	346	Innes v. Gordon, (1802), <i>Drawer's Sub-</i>	
Hotchkiss v. Walker's Trustees,	700	scription,	435, 440
Houlditch v. Spalding,	824, 825	Innes v. Gordon (1844), <i>Accretion,</i>	689
Houldsworth v. British Linen Company,	468	Innes v. Gordon (1844), <i>Superior's Title,</i>	1052
Houston v. Aberdeen Town and County		Innes v. Innes,	750
Bank,	525	Innes v. Innes' Trustees,	55
Houston v. Corbet,	290	Innes v. Ker,	952
Houston v. Houston,	1030	Innes v. Phillips,	346
Houston v. Shaw,	268	Innes v. Reid's Trustees,	1059
Houston v. Stirling,	516	Inverness, Magistrates of, v. Bell's Trus-	
Houstoun v. Yuill,	485	tees,	1067
Howden v. Ferrier,	627	Inverness, Magistrates of, v. Duff,	1057,
Howden v. Howden,	900		1059
Howden v. Porterfield,	980	Irvine v. Irvine (1723), <i>Contravention,</i>	973
Howes v. Campbell,	330	Irvine v. Irvine (1738), <i>Delivery,</i>	95
Hume v. Baillie,	523	Irvine v. Irvine (1851), <i>Partner's Share</i>	
Hume v. Hume,	268	Moveable,	384, 991
Hume v. Earl of Hume,	151	Irvine v. Laing,	458
Hume v. Lord Justice-Clerk,	179, 182	Irvine v. Mayne,	56
Hume v. Nisbet,	152	Irving and Copland,	266
Hume v. Youngson,	341		
Hunter v. Adair,	266	JACK v. CRAMOND,	361
Hunter v. Boog,	591	Jack v. Jacks,	38
Hunter v. Duff,	478, 480	Jack v. Lauder,	911
Hunter v. Hill,	195	Jackson v. Williamson,	458
Hunter v. Kellie,	969	James v. Downie,	1080
Hunter v. Lees,	522	Jamieson v. Gillespie,	446
Hunter v. Nisbet,	997	Jamieson v. Jamieson,	463
Hunter v. Stewart,	597	Jamieson v. Sheriff,	56
Hunter's Trustees v. Hunter,	809	Jardine v. Currie,	851
Hunters and Company v. Bowie,	771	Jardine v. Jardine,	998
Huntly v. Hume,	598	Jarron v. Smith and Company,	459, 464
Huntly, Marquis of,	985, 987	Jeffrey v. Aitken,	1073
Hutchinson and Son v. Scott,	660	Jeffrey v. Campbell,	169
Hutton v. Macfarlane,	659, 686	Jeffrey v. Campbell's Children, 850, 851,	852
Huttons v. Hutton,	487	Jeffrey v. Mathieson,	128

	PAGE		PAGE
Jessop,	963	Keith's Trustees v. Countess of Flahault,	
Joel v. Gill,	751	<i>Thelusson Act</i> ,	909, 910
Johns v. Monro's Trustees,	917	Kelland v. Douglas,	92
Johnston v. Berry,	181	Kellie, Earl of, and Others,	14
Johnston v. Cheape,	352, 358, 369	Kelly v. Kelly,	91
Johnston v. Clerk,	133	Kelso,	22
Johnston v. Cunningham,	777	Kemp v. Ferguson, <i>Deletions</i> ,	6
Johnston v. Goldamid,	135	Kemps v. Ferguson, <i>Testament</i> ,	86
Johnston v. Hogg,	465	Kempt v. his Creditors,	61
Johnston v. Home,	170	Kennedy v. Allan,	780, 781
Johnston v. Johnston (1640), <i>Diligence</i>		Kennedy v. Arbuthnot (1722), <i>Blanks</i> ,	27
<i>in Pupil's Name</i> ,	114	Kennedy v. Arbuthnot (1725), <i>Date of</i>	
Johnston v. Johnston (1668), <i>Marginal</i>		<i>Bill</i> ,	443
<i>Addition</i> ,	71	Kennedy v. Kennedy (1819), <i>Arbitration</i> ,	362
Johnston v. Johnston (1740), <i>Clause of</i>		Kennedy v. Kennedy, (1829), <i>Entail</i> ,	814
<i>Return</i> ,	858		964
Johnston v. Johnston (1840), <i>Vesting of</i>		Kennedy v. Ramsay's Trustees,	1029
<i>Legacy</i> ,	919	Kennedy v. M'Whirter,	470
Johnston v. Napier,	176	Kennedy v. Rose,	914
Johnston v. Orchardtoun,	279	Kennedy v. Watson (1816), <i>Signature</i>	
Johnston v. Pettigrew,	56	<i>by Mark</i> ,	434
Johnston and Company v. Athwell,	191	Kennedy v. Watson (1848), <i>Jus Mariti</i> ,	126
Johnstone v. Coldstream,	225	Kennedy v. Wightman,	896
Johnstone v. Glen,	508	Kennedy, Lady, v. Innes,	110, 113
Johnstone v. Irving,	858	Ker (1804), <i>Entail, Registration</i> ,	963
Johnstone v. Johnstone's Trustees,	676	Ker (1855), <i>Trustee's Powers</i> ,	890
Johnstone v. Lowden,	1042	Ker v. Abernethy,	655
Johnstone v. Mackenzie's Executors,	137	Ker v. Edgar,	176
Johnstone v. Paterson,	180	Ker v. Erskine,	902
Johnstone v. Rome,	152	Ker v. Gibson,	46
Jolly v. McNeill, <i>Compound Interest</i> ,	244, 245	Ker v. Gordon,	276
Jolly v. McNeill, <i>Sexennial Prescription</i> ,	486	Ker v. Hotchkiss,	44
Journeymen Dyers v. Thomson,	335	Ker v. Howieson,	1024
Junquet la Pine v. Lord Semple's Cre-		Ker v. Innes,	993
<i>ditors</i> ,	84	Ker v. Ker, (1677), <i>Delivery of Deed</i> ,	98
Justice-Clerk, Lord, v. Hamilton,	234	Ker v. Ker (1810), <i>Eldest Daughter</i> ,	996
<i>(cited under name Lord Grange)</i> .		Ker v. Ker's Trustees,	87, 903
KAY v. WILSON'S TRUSTEES,	895	Ker v. M'Kechnie,	386
Keddie v. Christie,	99	Ker v. Primrose,	766
Keggie v. Christie,	124	Ker v. Riddell,	434
Keiller v. Thomson's Trustees,	912	Ker v. Russel,	750
Keir v. Menzies's Creditors,	299	Ker v. Turnbull,	967
Keir v. Pardowie,	69	Kerr v. Bremner,	263
Keith,	769	Kerr v. Dickson,	560
Keith v. Grant,	772	Kerr v. James,	884
Keith v. Johnstone's Tenants,	1114	Kerr v. M'Dowall,	175
Keith v. Maxwell,	1080	Kerr v. Marquis of Ailsa,	661
Keith's Trustees v. Countess of Flahault,		Kerr v. Wood,	1073
<i>Discharge of Terce and Jus Relictæ</i> ,	812,	Kibble v. Ross,	617
	813	Kibbles v. Stevenson,	626
Keith's Trustees v. Countess of Flahault,		Kidd v. Kidd,	137
<i>Election</i> ,	842	Kidd v. Paterson,	360
Keith's Trustees v. Countess of Flahault,		Kildonan v. Douglas, Heron, and Com-	
<i>Homologation</i> ,	180	<i>pany</i> ,	1076
		Kincardine, Countess of, v. Earl of Mar,	737

INDEX OF CASES.

1271

	PAGE		PAGE
King v. Baillie,	190, 199	Laurie v. Laurie (1859), <i>Designation of</i>	
King v. Creighton,	475	<i>Writer,</i>	56
King v. Earl of Stair,	942	Laurie v. Laurie (1859), <i>Holograph,</i>	74
King v. Treble,	476	Lawrie v. Donald and Jones,	335, 967
Kinghorn, Earl of, v. Hay,	186	Lawrie v. Hay,	300
Kinloch,	890	Lawrie v. Stewart,	275
Kinloch v. Lourie,	201	Lawrie's Trustees v. Lawries,	906
Kinloch v. Mackintosh,	271	Lawson v. Coldstream,	339
Kinloch v. Mansfield,	1103	Lawson v. Kirk-session of Dundee,	909
Kinminity, Creditors of, v. Lady Kin-		Lawson v. Laird of Ardkinlas,	324
minity, <i>Provision of Conquest,</i>	833	Lawson v. Lindsay's Creditors,	66
Kinminity, Creditors of, v. Lady Kin-		Lawson v. Ogilvy,	1107
minity, <i>Inhibition,</i>	1093	Lawson v. Stewart,	917
Kinnoull, Earl of,	982	Learmonth,	771
Kinross, Feuars of, v. Bruce,	599	Learmonth v. Governors of Trinity Hos-	
Kintore, Earl of, v. Union Bank,	368	pital, <i>Entry of Corporation,</i>	1056, 1059
Kintore, Executors of Earl of, v. Earl		Learmonth v. Governors of Trinity Hos-	
of,	986	pital, <i>Renunciation of Casualties,</i>	587
Kippen v. Stewart,	669	Leckie v. Leckie,	105
Kippen's Trustees v. Darnley,	838, 853, 854	Ledingham v. Elphinstone, <i>Arbitration,</i>	
Kirkcaldy v. Dalgairns' Trustee,	366	<i>Claims,</i>	355
Kirkham v. Campbell,	614	Ledingham v. Elphinstone, <i>Arbitration,</i>	
Kirkland,	112	<i>Hearing Parties,</i>	358
Kirkman v. Pym,	114, 329	Lee v. Donald,	1047
Knill v. Williams,	476	Lees v. Mackinlay,	600
Knox v. Hume,	371	Leighton v. Russell,	813
Knox v. Martin (1847), <i>Charge against</i>		Leiper v. Cochrane, <i>Circumvention,</i>	164
<i>Partner,</i>	501	Leiper v. Cochrane, <i>Quadiennium Utile,</i>	115
Knox v. Martin (1850), <i>Back Bond,</i>	1080	Leith v. Blaikie,	137
Kyle v. Jeffreys,	313	Leith v. Garden,	302
Kyle v. Kyle,	132	Leith v. Leith (1862), <i>Aberdeen Act,</i>	
Kyle v. Thomson,	289	<i>Unlet Shootings,</i>	804
		Leith v. Leith (1862), <i>Composition,</i>	1057
LACKIE v. CUNNINGHAM,	48	Leith v. Leith (1863), <i>Sale of Trust</i>	
Laidlaw,	197	<i>Estate,</i>	888
Laidlaw v. Hamilton,	485	Leith Banking Company v. Bell,	340
Laidlaw v. Park,	477	Leith Banking Company v. Walker's	
Laidlaw v. Smith,	523	<i>Trustees, Presentment of Promissory-</i>	
Laidlaw v. Wylde,	146	<i>Note,</i>	446, 463
Laird v. Laird's Trustees,	387, 892	Leith Banking Company v. Walker's	
Lambton and Company v. Marshall,	450	<i>Trustees, Protest, Notary,</i>	467
Lamertoun, Lady, v. Laird of Polwart,	610	Leith Banking Company v. Walker's	
Lammington, Laird of, v. Moon,	780	<i>Trustees, Testing-Clause,</i>	222
Lamont v. Duke of Argyle,	702	Leith Hay v. Leith Hay,	958
Lamont v. Lauchlan's Creditors,	867	Leith's Trustees v. Leith,	18, 85, 898
L'Amy v. Neilson's Trustees,	884	Lennox v. Hamilton,	644
Lang v. Brown, <i>Expiry of Submission,</i>	364	Leny v. Leny,	968
Lang v. Brown, <i>Oversman,</i>	367	Lermont v. Lermont's Heirs,	506
Lang v. Dixon,	558, 667	Leslie,	242
Lang v. Lang,	952, 961	Leslie v. Forbes,	134
Langley v. Hogg,	462	Lealy v. Gray,	274
Latta v. Bremner,	143	Lealy v. Millers,	90
Lauder v. Wingate,	383	Lealy v. Pringle,	508
Laurie v. Laurie (1854), <i>Entail, Resolu-</i>		Leven, Earl of, v. Montgomery,	941
<i>tive Clause,</i>	960	Levick v. Cadell and Company,	175

	PAGE		PAGE
Lillie v. Macdonald,	294	Love v. Storie,	529
Lindoris v. Stewart,	102	Low v. Farquharson,	270
Lindsay v. Anstruther,	987	Low v. Henry,	340
Lindsay v. Clelland,	332	Low v. Jendwine,	1000
Lindsay v. Earl of Buchan,	479	Low v. Millar,	480
Lindsay v. Giles, <i>Registration of Sasine</i> ,	624	Lowe v. Campbell,	477
Lindsay v. Giles, <i>Sasine, Date</i> ,	607	Lowe v. Greig,	271
Lindsay v. Giles, <i>Writer of Deed</i> ,	58	Lowndes v. Douglas,	864
Lindsay v. North-Western Railway Co.,	516	Ludquhairn, Lord, v. Lord Haddo,	149
Lindsay v. Sheild,	171	Lumsden v. Buchanan,	399
Lindsay and Others,	886	Lumsden v. Gordon, <i>Partner's Powers</i> ,	356
Lindsay's Children v. Dott,	781, 1019	Lumsden v. Gordon, <i>Submission</i> ,	350
Lindsays v. Moffate,	483	Lumsden v. Lumsden,	947, 961
Linning v. Douglas,	335	Lumsden v. Urie,	407
Liquidators of Western Bank,	402	Luss, Lady, v. Inglis,	1052
Lister v. Ramsay,	525	Lyell v. Chrystie,	287
Liston v. Galloway,	562	Lyle v. Falconer, <i>Arbiter's Fees</i> ,	361
Lithgow v. Wilkison,	567	Lyle v. Falconer, <i>Confirmation</i> ,	1050
Little v. Dickson,	659	Lyle v. Falconer, <i>Interim Decree-Arbitral</i> ,	360
Littlejohn v. Allan,	464	Lyle v. Greig and Others,	507
Littlejohn v. Hamilton,	751	Lynedoch v. Ouchterlony,	906
Littlejohn v. Hepburn,	42	Lyon v. Blair,	995
Livingston v. Gordon,	383	Lyon v. Creditors of Easter Ogle,	823
Livingston v. Johnson,	350, 422	Lyon v. Earl of Aboyne,	66
Livingston v. Kinloch,	520	Lyon v. Law,	298
Livingston v. Lindsay,	302		
Livingston v. Lord Napier,	1023	MACADAM v. MACWILLIAM,	464
Livingstone v. Clark,	559	Macalister v. Macalister,	785, 1103
Loch v. Nairn,	277	Macallum v. Laurie,	361
Lockhart v. Ferrier,	683	Macallum v. Robertson, <i>Majority of Arbiters</i> ,	371
Lockhart v. Kennedy,	1031	Macallum v. Robertson, <i>Submission, Notes</i> ,	369
Lockhart v. Lockhart,	805, 828	Macanquhal v. Boswell,	362
Lockhart v. Macdonald,	995	M'Ara v. Watson,	440, 475
Lockhart v. Mackenzie's Trustees,	113	Macara v. Wilson,	1026
Lockhart v. Moreton,	1010	M'Arthur v. Scott,	270
Lockhart v. Trotter,	329	Macarthur v. Simpson,	1114
Logan, Lady, v. Affleck,	327	Macartney v. Hannah,	466
Logan v. Ellice,	199	M'Aslan and Others,	907
Logan v. Lang,	372	M'Aslan v. Glen,	95
Logan v. Logan (1823), <i>Delivery of Deed</i> ,	96, 102	M'Aulay v. Gault,	519
Logan v. Logan (1836), <i>Liferent and Fee</i> ,	782, 1019	M'Bean v. M'Pherson,	435
Logan v. Meiklejohn,	906	M'Bride v. Bryson,	102
London Joint-Stock Bank v. Stewart, <i>Bill, Negotiation</i> ,	447, 454	Macbride v. Paul,	774
London Joint-Stock Bank v. Stewart, <i>Bottomry, Master's Power</i> ,	416	Macbryde v. Macrae's Executors,	368
Long v. Taylor,	153	M'Caul v. Vareils,	426
Lord v. Colvin,	888	M'Clymont v. Hughes,	826
Lothian, Earl of, v. Vassals of Jedburgh,	1075	M'Cormick v. M'Cubbin,	376
Lovat, Lord, v. Fraser,	361	M'Coull v. Braidwood,	146
Love or Brodie v. Love,	370	Macculloch v. Macculloch,	909
Love v. Kemp's Creditors,	157	M'Culloch v. Maitland,	795
		M'Diarmid v. M'Diarmid,	161
		Macdonald v. Doig,	844

INDEX OF CASES.

1273

	PAGE		PAGE
Macdonald v. Lord Macdonald (1831), <i>Montgomery Act, Declarator,</i>	987	M'Gillivray v. M'Arthur,	273
Macdonald v. Lord Macdonald (1835), <i>Montgomery Act, Improvements,</i>	986	M'Gillivray's Executors v. Maason, 237,	337
Macdonald, Lord, v. Macdonald (1840), <i>Montgomery Act, Unrecorded Entail,</i>	985	M'Gowan v. Bell,	781
Macdonald, Lord, v. Macdonald (1864), <i>Choosing Curators,</i>	109	M'Gowan v. M'Kellar,	168
Macdonald v. Macdonald (1714), <i>Side-</i> <i>scribing,</i>	35	M'Gowan v. Montgomery,	782
Macdonald v. Macdonald (1778), <i>Paging</i> <i>of Deeds,</i>	58	M'Gown v. M'Kinlay,	1042
Macdonald v. Macdonald (1843), <i>Sub-</i> <i>mission, Proof,</i>	358	M'Gown v. Neilson,	510
M'Donald v. M'Donald (1807), <i>Factor's</i> <i>Powers,</i>	422	M'Gregor v. M'Gregor,	482
Macdonald v. Mackinnon,	1025	Macgregor v. Macdonald, <i>Adjudication</i> <i>in Implement,</i>	765
Macdonald v. M'Lachlan,	833	M'Gregor v. Macdonald, <i>Assignment of</i> <i>Writs,</i>	1070
Macdonald v. Macleod,	515	Macgregor v. Mitchell,	345, 348
Macdonald v. Place,	1063	M'Ilwraith v. M'Micken,	433
M'Donald v. Stewart,	255	M'Indoe v. Frame,	483
Macdonald v. Union Bank,	488	M'Intosh v. Farquharson,	176
M'Donald's Trustees v. Rankin,	435	M'Intosh v. Fraser,	114
Macdonnell v. Commissioners of Cale- donian Canal,	565	Mackintosh v. Grant,	192
Macdonnell v. Duke of Gordon,	658	Mackintosh v. Inglis, <i>Judicial Sale,</i>	772
M'Donnells v. Bell and Rannie,	166	Mackintosh v. Inglis, <i>Sasine, Notary's</i> <i>Docquet,</i>	615
M'Doual v. M'Doual,	991	M'Intosh v. Macdonald,	434, 437
Macdougall v. Macdougall,	658	M'Intosh v. Macdonell,	1108
Macdougall v. Foyer, <i>Additional Accep-</i> <i>tor,</i>	440	Mackintosh v. Macintosh (1812), <i>Life-</i> <i>rent and Fee,</i>	781, 1018
Macdougall v. Foyer, <i>Bill, Cautioner,</i>	438	Mackintosh v. Mackintosh, (1855), <i>En-</i> <i>tail, Interpretation,</i>	961
Macdowal v. Duke of Douglas,	445	Mackintosh v. Pitcairn,	1081
Macdowal v. Macdowal's Creditors,	1047	M'Intosh v. Scottish Union Insurance Company,	1106
M'Dowal v. Fullertoun,	293	M'Intosh v. Stewart,	197
Macdowall v. Hamilton,	683	M'Intyre v. Masterton,	1063
M'Dowall v. Russell,	312, 924	M'Intyre v. Macfarlane's Trustees, 81,	904
M'Ewen v. Doig,	161	Mackay v. Dalrymple, <i>Prescription</i> <i>against Entail,</i>	658
M'Ewen v. Graham,	475	Mackay v. Dalrymple, <i>Entail, Contra-</i> <i>vention,</i>	973, 974
M'Farlan,	608	M'Kay v. Robertson,	240
M'Farlane v. Campbell,	1076	M'Kechnie v. Graham,	982
Macfarlane v. Donaldson,	895	M'Kechnie v. Macfarlane,	454
Macfarlane v. Forrester,	521	Mackellar v. Marquis,	779, 780, 785
M'Farlane v. Grieve,	56	Mackellar's Creditors v. M'Math,	279
M'Farlane and Others,	908	M'Kellar v. Campbell,	455
Macfarlane v. Watt,	329	M'Kenzie v. Burnet,	40
Macfarlane v. Whitson,	510	M'Kenzie v. Clarke,	352
M'Farquhar v. Calder,	78	M'Kenzie v. Craigies,	1107
M'Ghie v. Henderson,	505	Mackenzie v. Forbes,	152
M'Ghie v. Leishman,	615	Mackenzie v. Girvan,	356, 371
M'Gibbon v. M'Gibbon,	113	M'Kenzie v. Gordon,	1090
M'Gilchrist v. Arthur,	488, 489	Mackenzie v. Hall,	472
M'Gill v. Hutchison, <i>Assignment,</i>	303	Mackenzie v. Creditors of Kinminnity,	138
M'Gill v. Hutchison, <i>Holograph, Date,</i>	76	Mackenzie v. Lord Lovat,	1063
M'Gill v. Laurestoun,	293	Mackenzie v. Macartney,	340
		M'Kenzie v. M'Kenzie (1752), <i>Addi-</i> <i>tional Cautioner,</i>	277

	PAGE		PAGE
Mackenzie v. Mackenzie (1777), <i>Entry, Heir of Tailzie</i> ,	1053	M'Lurg v. Blackwood,	104
Mackenzie v. Mackenzie (1818), <i>Service</i> ,	1021	M'Martin v. Forbes,	503
Mackenzie v. Mackenzie (1822), <i>Entail, Fetters</i> ,	950	M'Master v. Forsyth,	148
Mackenzie v. Mackenzie (1823), <i>Entail, Prohibitions</i> ,	955	Macmath v. Mackellar's Creditors,	169
Mackenzie v. Mackenzie (1838), <i>Non-entry</i> ,	1056	Macmichael v. Barbour,	113
Mackenzie v. Mackenzie (1840), <i>Salmon Fishing</i> ,	568	M'Michan v. M'Michan,	179
Mackenzie v. Noble,	482	M'Micken v. Kennedy,	56
Mackenzie v. Rose,	565	M'Millan v. Armstrong,	896
Mackenzie v. Smith,	467	Macmillan v. Campbell, <i>Erasure in Sasine</i> ,	627, 727
Mackenzie v. Tuach,	519	M'Millan v. Campbell, <i>Reversion of Trust-Estate</i> ,	312, 751
Mackenzie's Creditors v. his Children,	832	M'Millan v. M'Millan, <i>Disposition and Settlement</i> ,	867
Mackenzie's Trustees v. Leckie,	329	M'Millan v. M'Millan, <i>Holograph</i> ,	74
M'Kessock v. Drew,	361	M'Millan v. M'Millan, <i>Mutual Settlement</i> ,	898
Mackie v. Hilliard and Company,	469	M'Millan v. Price,	410
Mackie v. Magistrates of St. Monance,	560	M'Nab v. Spittal,	868
M'Kilikin v. Monro,	267	Macnair v. Gray,	103
Mackilligin v. Mackilligin, <i>Precept of Sasine</i> ,	603	M'Nair v. M'Nair,	336
Mackilligin v. Mackilligin, <i>Trustees</i> ,	877	M'Nair and Co. v. Gray, Hunter, and Speirs,	386
M'Kinlay, Robertson v.	263	M'Nair's Trustees v. Roxburgh,	358
M'Kinney v. Van Heck,	439	M'Neil v. Blair,	483, 485, 486
Mackinnon v. Macdonald,	812	M'Neil v. Campbell,	441
Mackinnon v. Mackinnon,	1025	M'Neil v. M'Neil's Trustees,	818
M'Kirdy v. Anstruther,	149	M'Neill v. Cameron,	660
M'Lachlan v. Henderson,	453, 454	M'Neill v. M'Neill,	243
M'Lachlan v. Tait,	1059	M'Neill v. Moir,	161
M'Lachlan v. Thomson,	480	M'Neill v. Steele's Trustees,	851
M'Lachlan v. Watson's Trustees,	851	M'Neillie v. Cowie,	223
Maclagan's Creditors v. Maclagan,	172	M'Nicol v. M'Neill,	481
MacLaine v. MacLaine (1807), <i>Entail, Alteration of Succession</i> ,	952	Maconochie,	111, 121
MacLaine v. MacLaine (1845), <i>Aberdeen Act, Rental</i> ,	805	Maconochie v. Greenlee,	821
MacLaine v. MacLaine (1852), <i>Registration of Sasine</i> ,	624, 625	Maconochie v. Governors of Trinity Hospital, <i>Dispossee's Title</i> ,	655
M'Laren v. Marquis of Breadalbane,	192	Maconochie v. Governors of Trinity Hospital, <i>Entry</i> ,	1053
M'Lauchlan v. Campbell,	996	M'Coull v. Braidwood,	146
M'Lauchlan v. MacLauchlan (1760), <i>Bill</i> ,	441	M'Pherson v. M'Intosh,	849
MacLauchlan v. MacLauchlan (1768), <i>Entail</i> ,	941	Macpherson v. Macpherson (1839), <i>Aberdeen Act, Rental</i> ,	804
M'Laud v. Young,	248	Macpherson v. Macpherson (1850), <i>Expense of Stamp</i> ,	199
Maclean v. Campbell,	244, 245	Macpherson v. Macpherson (1850), <i>Writer's Designation</i> ,	57
M'Lean v. Morrison,	474	Macpherson v. Macpherson and Clark, <i>Lease</i> ,	1114
M'Lean v. Rose,	501	Macpherson v. Macpherson and Clark, <i>Rei Interventus</i> ,	186
M'Lean v. Sword,	146	Macpherson v. Munro,	195
M'Leish v. Renny,	796	Macpherson v. Tod,	770
Macleod v. Bisset,	361	Macpherson v. Tytler (1839), <i>Montgomery Act, Improvements</i> ,	987
M'Leod v. Cunninghame,	218	Macpherson v. Tytler (1850), <i>Trustees</i> ,	895
Macleod v. Sinclair,	346		

INDEX OF CASES.

1275

	PAGE		PAGE
M'Quaker v. Phoenix Insurance Com- pany, <i>Decree-Arbitral</i> ,	370	Marshall v. Edinburgh and Glasgow Railway Company,	369
M'Quaker v. Phoenix Insurance Com- pany, <i>Delivery</i> ,	104	Marshall v. Lamont,	493
Macqueen v. Nairne,	624	Marshall v. Marshall, <i>Endurance of Partnership</i> ,	377
Macrae v. Macrae, <i>Outlawry</i> ,	134	Marshall v. Marshall, <i>Use of Firm</i> ,	375
M'Rae v. Macrae, <i>Liferent Escheat</i> ,	585	Marshall v. Marshall, <i>Winding Up</i> ,	382
M'Rankin v. Schaw,	265	Martin,	130
Macreadie v. Macfadzean's Executors,	857	Martin v. Dunbar,	960
M'Ritchie's Trustees v. Hope,	598	Martin v. Paterson,	1063
Macrorie v. M'Whirter and Gray, <i>Lease</i> ,	1114	Martin v. Smith,	458
Macrorie v. M'Whirter and Gray, <i>Rei Interventus</i> ,	186	Martin v. Wight,	689, 1051
M'Rostie v. Hallie, <i>Bill, Registration</i> ,	471	Mason v. Wilson,	142
M'Rostie v. Hallie, <i>Date of Bill</i> ,	474	Matheson v. Matheson and M'Kenzie,	366
M'Taggart v. Jeffrey,	326	Matheson and Son v. Ross,	198
M'Taggart's Representatives v. Watson,	341	Mathieson,	121
M'Tavish v. Lady Saltoun, <i>Partner's Liability</i> ,	386	Mathieson v. Fisher,	277
M'Tavish v. Lady Saltoun, <i>Sezennial Prescription</i> ,	483	Mathieson v. Mathieson,	853
M'Tavish's Children v. his Creditors,	832	Maule v. Maule (1782), <i>Entail, Contra- vention</i> ,	968
Macvicar v. Cochrane and Ker,	585, 586	Maule v. Maule (1816), <i>Submission</i> ,	372
M'Whirter v. Guthrie,	379	Maule v. Maule (1829), <i>Entail of Lease</i> ,	941
Maiklem v. M'Gruthar,	97	Maver v. Russel,	40
Mair and Sons v. Thom's Trustees,	97, 1081	Maxwel v. Nithsdale,	273
Maitland v. Cockerell,	1080	Maxwell (1850), <i>Trustee, Law Agent</i> ,	893
Maitland v. Duncan,	61	Maxwell (1857), <i>Disentail</i> ,	972
Maitland v. Forbes,	99	Maxwell v. Blair,	146
Maitland v. Hoffman,	88	Maxwell v. Drummond's Trustees, 151,	1073
Maitland v. Maitland,	829	Maxwell v. Duke of Queensberry's Exe- cutors,	1111
Maitland v. Representatives of Mitchell and Arnot,	362	Maxwell v. Lyon,	949
Majendie v. Carruthers,	820	Maxwell v. Nithsdale's Tenants,	615
Malcolm v. Bardner,	181	Maxwell v. Thomson,	144
Malcolm v. Lady Malcolm,	807	Maxwell v. Wyllie,	916
Malcom v. Northern Reversion Co.,	1094	May v. Malcolm,	525
Mann v. Dickson (1830), <i>Confirmation</i> ,	1044	Mayne v. M'Keand,	894
Mann v. Dickson (1857), <i>Trustee in Se- questration</i> ,	141	Mead v. Anderson,	84
Mansfield, Earl of, v. Gray,	1058	Meek v. Dunlop,	53
Mansfield v. Inglis,	557	Meldrum v. Maitland,	952
Mansfield v. Stuart (1840), <i>Transmis- sion of Deed</i> ,	219	Melliss v. Royal Bank, <i>Cash Credit</i> ,	258
Mansfield v. Stuart (1841), <i>Interdiction</i> ,	132	Melliss v. Royal Bank, <i>Discharge of Partners</i> ,	332
Mansfield v. Walker's Trustees,	171	Melvil v. Arnot,	115
Manuel v. Manuel,	113, 115	Melvil v. Drummond,	84
Mar, Earl of, v. Erskine,	805	Melville,	332
Mar, Earl of, v. Ramsay,	573, 579	Melville and Dundas,	677, 981, 1074
March, Earl of, v. —, —,	44	Melville v. Erskine's Trustees,	600
March, Earl of, v. Kennedy,	968, 969	Melville, Lord, v. Wemyss,	207
Marder's Trustees v. Marder,	838	Melville, Viscount, v. Preston,	907, 975
Marjoribanks v. Amos,	323	Melvin v. Dakers, <i>Assignment of Writs</i> ,	926,
Marr v. Lumsden,	476		1070
Marshall and Rathven v. Wight,	1098	Melvin v. Dakers, <i>Sasine</i> ,	623
		Melvin v. Nicol,	913
		Menzies v. Barstow,	675, 676
		Menzies v. Earl of Breadalbane,	571

	PAGE		PAGE
Menzies v. Gillespie's Creditors,	123	Moncrief v. Cockburn's Creditors,	546
Menzies v. Macdonald,	565	Moncrief v. Newton's Tenants,	796
Menzies v. M'Gregor,	363	Moncrieff v. Arnott,	1104
Menzies v. Menzies, <i>Entail, Institute,</i>	949	Moncrieff v. Hay,	171
Menzies v. Menzies, <i>Entail, Prohibition,</i>	952	Moncrieff v. Monypenny,	37, 78
Menzies v. Wood,	1036	Moncrieff v. Waugh,	337
Merry and Cunninghame v. Brown,	354	Monro v. Bain,	264
Merry v. Howie,	69	Monro v. Duff,	1050
Meuse v. Craig's Executors,	238	Monro v. Edinburgh Cemetery Co.,	406
Middlemore v. Macfarlane's Represen- tatives,	774	Monro v. Gordon,	820
Middleton v. Chalmers,	367	Monro v. Mackenzie,	590
Middleton v. Jorston,	1105	Monro v. Miller,	1103
Middleton v. Legget,	206	Monro v. Monro,	102
Middleton and Paterson v. Earl of Dunmore,	730	Monteath's Trustees v. Douglas,	170
Mill v. Hoar,	519	Monteith v. Murray,	503
Mill v. Russell,	475	Montgomerie v. Brown,	183
Mill v. Salkeld and Company,	465	Montgomerie v. Carrick,	362, 364
Miller v. Blair,	569	Montgomerie v. Dalrymple,	616
Miller v. Brown (cited under name Brown),	1063	Montgomerie v. Wauchope,	246
Miller v. Dickson,	654	Montgomery v. Brown,	268
Miller v. Farquharson,	48, 74	Montgomery v. Innes and Foulis,	548, 866
Miller v. Low,	170	Montgomery v. Montgomery,	305
Miller v. Miller,	833	Montrose, Duke of,	625
Miller v. Milne's Trustees,	123	Montrose, Duke of, v. Colquhoun,	701
Miller and Sons v. Miller,	357	Montrose, Duke of, v. Macintyre,	569
Miller v. Young,	653	Montrose, Magistrates of, v. Robertson,	921
Miller, M'Kay and Co. v. Robertson,	477	Moodie v. Moodie,	187
Millers v. Short,	266	Moon's Trustees v. Carmichael,	327
Milligan v. Barbour,	465	Moore,	962
Milligan v. Glen,	275	Moore's Mortification, Trustees of, v. Wilson,	887
Milne v. Anderson,	648	Moray, Countess of, v. Stewart,	186
Milne v. Murray,	200	Moray, Countess of, v. Wemyss,	568
Milne v. Smith,	568	Moray, Earl of, v. Pearson,	652
Minto v. Kirkpatrick,	384	Mordaunt, Baroness, v. Innes,	974
Mitchell,	407	More v. Grier,	370
Mitchell v. Adam,	1070	Morehead v. Morehead,	958
Mitchell v. Cable,	357	Mories v. Glen, <i>Stamp-Duty,</i>	195, 199
Mitchell v. Cunningham,	179	Mories v. Glen, <i>Vendition of Ship,</i>	417
Mitchell v. Davidson,	906	Morison,	121
Mitchell v. Ferguson,	1096	Morison v. Balfour,	341
Mitchell v. Findlay,	170, 172	Morison and Haldane,	112
Mitchell v. Miller,	48	Morison v. Lord Saltoun,	53
Mitchell v. Reynolds,	140	Morison v. Miller,	551
Mitchell v. Tarbutt,	774	Morrice v. Scott,	256
Mitchell v. Thomson's Trustees,	667	Morris v. Magistrates of Dundee,	228
Mitchelson v. Lady Cranston,	124	Morrison v. Maclean, <i>Witnesses,</i>	51
Moffat v. Marshall,	471	Morrison v. Maclean's Trustees, <i>Un- sound Mind,</i>	118
Moffat v. Robertson,	896	Morrison v. Miller,	894
Moir v. Graham,	946	Morrison v. Nisbet,	66
Moir v. Mudie,	902	Morrison v. Ramsay,	614
Moir v. Paul,	673	Morton,	720
Molle v. Riddell,	420	Morton v. Hunter and Co., <i>Cash-Credit Bond,</i>	1079
Moncreiffe,	155		

INDEX OF CASES.

1277

	PAGE		PAGE
Morton v. Hunter and Co., <i>Designation of Bailie</i> ,	609	Murray v. Oliphant's Wife,	557
Morton v. Young,	181	Murray v. Scott,	599
Mosman v. Bells,	298	Murray's Trustees v. Dalrymple,	124
Mounsey v. Maxwell,	546	Mushet v. Harvey,	248
Mountstewart, Lord, v. Lady Mackenzie,	1025	Musselburgh, Magistrates of, v. Brown,	1054
Mowat v. M'Lellan,	151	Myles v. Calman,	778
Mowat v. Mowat,	969	NAIRN v. FORBES AND COMPANY,	373
Mowbray v. Dickson,	357	Nairn, Magistrates of, v. Macintosh,	328
Muir v. Stirling,	182	Nairne v. Nairne,	963
Muir v. Wilson,	1103	Nairne v. Scrymgeour,	660
Muirhead,	905	Napier v. Balfour,	893
Muirhead v. Corrie,	525	Napier v. Carson,	468
Muirhead v. Muirhead,	985	Napier v. Spier's Trustees,	576
Muirhead v. Paterson,	777	Napier v. Wilson and Sons (1810), <i>Accommodation Bill</i> ,	456
Muirhead v. Stevenson,	371	Napier v. Wilson and Sons (1844), <i>Arbitration</i> ,	359
Muller v. Dixon,	112	Nasmyth v. Storie,	587
Mungel v. Calder,	440	Nasmyth v. Hare,	82, 899
Munro v. Coutts,	905	National Bank v. Hope,	479
Munro v. Drummond,	964	National Exchange Company of Glasgow v. Drew and Dick,	406
Munro v. Hogg,	199	Neil,	347
Munro v. Mackenzie,	354, 355	Neil and Tait v. Vashon,	345
Munro v. Munro (1812), <i>Prescription</i> ,	655	Neilson v. Baillie,	921
Munro v. Munro (1820), <i>Bill, Initials</i> ,	433	Neilson v. Donald,	1027
Munro v. Munro (1826), <i>Entail, Contravention</i> ,	960	Neilson v. Leighton,	447
Munro or Ross v. Drummond,	945, 964	Neilson v. Murray,	779
Murchie v. Macfarlane,	474	Neilson v. Rae,	384
Murdoch v. M'Kirdy and Others,	1036	Neilson v. Smiths,	523
Murdoch v. Moir,	186	Newbigging v. Russell,	918
Murdoch, Robertson, and Company v. Lee and Company,	474	Newlands v. Newlands' Creditors,	782
Mure v. Gilmour,	887	Newton v. Newton,	917
Mure v. Mure (1808), <i>Entail, Power of Leasing</i> ,	984	Newton and Co. v. Collogan and Co.,	296
Mure v. Mure (1837), <i>Entail, Heir-Portioners</i> ,	969	Nicholson v. M'Alister,	186
Mure v. Westenra,	702	Nicol v. Cameron,	895
Murison v. Templeton,	194	Nicol v. Fraser,	194
Murray,	770	Nicolson v. Ramsay,	917
Murray v. —,	967	Nimmo v. Common Agent in Ranking and Sale of Auchinblane,	854
Murray v. Buchanan,	208	Nimmo's Trustees v. Gordon,	898
Murray v. Campbell,	436	Nisbet v. Cairns,	678
Murray v. Donnelly,	70	Nisbet v. Fraser,	880
Murray v. Durham,	302	Nisbet v. his Factor,	502
Murray v. Jaffray,	176	Nisbet v. Johnston,	332
Murray v. Lady Semple,	55	Nisbet v. King,	563
Murray v. Murray (1671), <i>Homologation</i> ,	182	Nisbet v. Moncreiffe,	955
Murray v. Murray (1810), <i>Pactum Illicitum</i> ,	150	Nisbet v. Nisbet (1726), <i>Legitim</i> ,	842, 843
Murray v. Murray (1826), <i>Liferent and Fee</i> ,	779	Nisbet v. Nisbet (1738), <i>Heir of Marriage</i> ,	820
Murray v. Murray (1833), <i>Service, Predecease of Institute</i> ,	1021	Nisbet v. Stewart,	176
Murray v. Murray's Trustees,	180	Nisbet v. Young,	953
		Nisbet's Trustees v. Hawke,	915
		Nisbet's Trustee v. Robertson,	145

	PAGE		PAGE
Nisbett v. Halket, <i>Revocation of Post-nuptial Settlement</i> ,	851	Paterson v. Wright,	90
Nisbett v. Halket, <i>Terce</i> ,	796	Paton v. Paton,	270
Norie v. Porterfield,	265	Paton v. Smart,	667
North British Bank v. Thoms,	471	Pattison v. Campbell,	445
North British Railway Company v. Magistrates of Hawick,	560, 564	Pattison v. Roy,	153
Norton v. Anderson,	689	Patrick v. Watt,	486
Norton v. Stirling,	963	Paul v. Allison,	484
Ogilvie v. Baillie,	60, 61	Paul v. Boyd's Trustee,	304
Ogilvie v. Leslie,	205, 206	Paul v. Campbell's Trustees,	1069
Ogilvie v. Lord Balmerino,	98	Paul v. Gibson, <i>Affidavit</i> ,	44
Ogilvie v. Mercer,	548	Paul v. Gibson, <i>Husband's Concurrence</i> ,	128
Ogilvie v. Moss,	229, 435	Paul v. Hill,	142
Ogilvy v. Hume,	347	Paul v. Paul's Trustees,	911
Ogilvy v. Ogilvy, <i>Assignment by Heir</i> ,	821	Peacock v. Glen,	950, 1023
Ogilvy v. Ogilvy, <i>Service</i> ,	1015	Pearson v. Grierson,	1045
Oliphant v. Douglas,	61	Pearson v. Pearson and Robertson,	882
Oliphant v. Newton,	326	Peddle v. Doig's Trustees,	69
Oliphant v. Oliphant,	839	Peddle's Heirs v. Soot's Trustees,	1067
Oliphant v. Oliphant's Trustees,	953	Peebles v. Watson,	1084
Omey v. M'Larty,	918	Peirce v. Ross,	1093
Orbiston v. Hamilton,	425	Pentland v. Hare,	227
Ord v. Paul,	142	Percy v. Meikle,	370
Orme v. Diffors,	124	Perring v. Hone,	475
Ormiston v. Hill,	657, 1098	Perston v. Perston's Trustees,	891
Ormistons v. Ormiston,	818	Perth, Magistrates of, v. Earl of Wemyss,	568
Ormistoun, Lady, v. Hamilton,	53	Petley v. Mackenzie,	596
Orr v. Turnbull,	464	Philip,	740
Orr and Barber v. Union Bank,	488	Philip v. Milne,	485
Orrell v. Orrell,	382	Phin v. Guthrie,	916
Osborne v. Brown,	329	Phipps v. Edinburgh and Glasgow Railway Company,	352
Oswald,	220	Pickering v. Smith,	1078
Oswald v. Oswald,	827	Piggott v. Colvill,	1055
Oswald's Trustees v. Oswald,	953	Pilling v. Drake,	198
Owen v. Bryson,	270, 273	Pindar v. Davidson,	519
PAGAN v. WYLIE,	473	Pirie v. Collie,	155
Paget v. Earl of Galloway,	985	Pitcairn v. Drummond,	351
Paisley Union Bank v. Hamilton,	272	Pitcairn v. More,	364
Palmer v. Sinclair,	811	Pitmedden v. Patersons,	515
Panmure, Lord, v. Crokat,	842	Pitt v. Smith,	133
Panton v. Gillies,	913	Pittillo v. Forrester,	66, 69
Park v. Gib,	796	Plomer v. Lowell,	911
Park, Creditors of, v. Maxwell,	264	Plummer,	112
Park v. Robertson,	702	Pollexfen v. Stewart,	892
Park v. Wood's Trustees,	1094	Pollock v. Ballantine,	179
Paterson v. Balfour,	777	Pollock v. Commercial Bank,	502
Paterson v. Bonar,	250, 255	Pollock v. Harvey,	1114, 1115
Paterson v. Earl of Breadalbane,	362	Pollock v. Lockhart,	277
Paterson v. Grant,	376	Pollock v. Magistrates of Edinburgh,	591
Paterson v. Inglis,	77	Pollock v. Marnock,	1078
Paterson v. Paterson,	922	Pollock v. Pollock,	904
Paterson v. Sanderson,	363, 365	Pollok v. Paterson,	424
		Poole v. Anderson,	832
		Poplet v. Stockdale,	137

INDEX OF CASES.

1279

	PAGE		PAGE
Porteous,	720	Ramsay v. Cowan,	88
Porteous v. Bell,	59	Ramsay v. Duke of Roxburghe,	569
Porterfield,	985	Ramsay v. Goldie,	242
Porterfield v. Gardner,	603	Ramsay v. Lord Dalhousie,	108
Porterfield v. Graham,	780	Ramsay v. Maule,	97
Porterfield v. Stewart,	989	Ramsay v. Ramsay (1682), <i>Fee and Life-</i>	
Portland, Duke of, v. Baird and Co.,	1103,	<i>rent,</i>	778
	1109	Ramsay v. Ramsay (1682), <i>Heritable</i>	
Pratt v. Abercromby,	186	<i>Bond,</i>	239
Preston v. Earl of Dundonald's Creditors,	573	Ramsay v. Ramsay (1859), <i>Simony,</i>	144
Preston v. Heirs of Valleyfield,	962	Ramsay's Executors v. Graham,	386
Priestnell v. Hutchison,	126	Rankin v. Rankins,	997
Primrose,	124, 128	Rankine v. Gairdner,	882
Primrose v. Davy,	615	Rankine v. Read,	78
Primrose v. Primrose,	968	Read v. Russel's Trustee,	601
Pringle v. Biggar,	146	Reddie v. Williamson,	245
Pringle v. Fullarton,	176	Redfearn v. Ferrier,	167
Pringle v. Keill,	433	Redhead v. Kerr,	1114
Pringle v. Macmurdo,	1107	Reid (1830), <i>Pupil's Titles,</i>	110
Pringle v. Pringle,	138	Reid (1860), <i>Tutor-Dative,</i>	108
Pringle v. Tate,	340	Reid (1863), <i>Gratuitous Trustees Act,</i>	879
Proctor v. Anderson,	1090	Reid v. Baxter,	44
Proctor v. Carnegie,	710	Reid v. Coates,	139
Provan v. Calder,	487	Reid v. Grindlay,	467
Provan v. Provan,	919	Reid v. Kedder,	65, 221
Purdie v. Lord Torphichen,	654	Reid v. Maxwell,	267
Purdon v. Rowat's Trustees, <i>Discharge,</i>	158	Reid v. Milne,	487
Purdon v. Rowat's Trustees, <i>Misrepresentation,</i>	202	Reid v. Reid (1827), <i>Heir of Marriage,</i>	820
Purves v. Strachan,	689	Reid v. Reid, (1857), <i>Delivery of Writs,</i>	291
Purvis' Trustees v. Purvis,	86	Reid v. Shaw,	206
		Reid v. Walker,	360, 363
QUEENSBERRY, DUKE OF, v. VISCOUNT		Rennie v. Ritchie, <i>Assignment,</i>	314
STORMONT,	568	Rennie v. Ritchie, <i>Husband's Consent,</i>	123
Queensberry, Executors of Duke of, v.		Rennie v. Walker,	327
Duke of Buccleuch,	954, 973	Renny,	770
Queensberry, Executors of Duke of, v.		Renton v. Anstruther, <i>Entail,</i>	939
Tait,	246	Renton v. Anstruther, <i>Procuratory,</i>	707, 711
Queensberry, Marquis of, v. Executors		Renton v. North British Railway Co.,	351
of Duke of Queensberry,	964	Rhind v. Commercial Bank of Scotland,	90
Queensberry, Trustees of Duke of, v.		Richardson v. Harvey,	341
Earl of Wemyss,	1014	Richardson v. Sinclair,	151
		Richardson v. Stewarts,	997
RAE v. GLASS,	138	Richmond, Duchess of, v. The Duke,	
Rae v. Henderson,	195	<i>Children's Provisions,</i>	980
Raeburn v. Baird,	660	Richmond, Duchess of, v. The Duke,	
Railton v. Richmond,	163	<i>Entailer's Debt,</i>	967
Rainnie v. Milne,	456	Richmond v. Grahame,	248
Rait v. Primrose,	222	Riddel v. Dalton,	812
Railton v. Mathews,	163	Riddel v. Inglis,	102
Ralston v. Farquharson,	667	Riddel v. Niblie's Creditors,	1080
Ralston v. Lamond,	486	Riddle v. Christie,	175
Ralston v. Ralston,	919	Ritchie v. Rennie,	123
Ramsay,	985	Rob v. Rob,	108
Ramsay v. Commercial Bank,	316, 1113	Robb v. Forest,	199
		Robertson v. Abercromby,	48

	PAGE		PAGE
Robertson v. Ainalie's Trustees,	174	Ross v. Monteith,	1112
Robertson v. Annan,	475	Ross v. Robertson,	479
Robertson v. Brown,	361	Ross v. Ross (1770), <i>Exclusion of Heir</i> ,	866,
Robertson v. Cheyne,	362		868
Robertson v. Duke of Athole,	780	Ross v. Ross, (1809), <i>Seclusion of Ex-</i>	
Robertson v. Gamack,	465	<i>cutors</i> ,	240
Robertson v. Gilchrist,	1043	Ross v. Ross's Trustees,	84
Robertson v. Gordon,	368	Ross v. Shaw,	504
Robertson v. Gray,	131	Ross v. Webster,	199
Robertson v. Handyside,	168	Ross's Trustees v. Aglianby,	44
Robertson v. Ker (1687), <i>Arrestment</i> ,	523	Rosslyn, Earl of, and Others,	1074
Robertson v. Ker (1742), <i>Paging Deeds</i> ,	58	Rothes, Earl of, v. Lealie,	73
Robertson v. Lord Halkertoun,	992	Roughhead or Tod v. Hunter,	885
Robertson v. M'Caig,	50	Roughheads v. Rannie,	857
Robertson v. M'Kinlay,	263	Routledge v. Carruthers,	820
Robertson v. Morrison,	895	Rowan v. Alexander,	899
Robertson v. Ogilvie's Trustees, <i>Holograph, Erasure</i> ,	67	Rowand v. Campbells,	1084
Robertson v. Ogilvie's Trustees, <i>Onus</i> ,	75	Rowand v. Cochrane,	662
Robertson v. Ramsay,	103	Rowand v. Lang,	267
Robertson v. Rennie,	155	Rowand v. Stevenson,	1085
Robertson v. Robertson (1685), <i>Children's Provisions</i> ,	853	Rowe v. Earl of Buchan,	952
Robertson v. Robertson (1785), <i>Disposition</i> ,	869	Roxburghe, Duke of, v. Ballenden	
Robertson v. Rutherford,	652, 659	Ker,	954
Robertson v. Young,	37	Roxburghe, Duke of, v. Hall,	613
Robertson's Creditors v. Robertson's Creditors,	237	Roxburghe v. Wauchope (1820), <i>Implied Revocation</i> ,	899
Robertson's Trustees v. Glasgow,	888	Roxburghe, Duke of, v. Wauchope	
Robin v. Drummond,	582	(1825), <i>Confusion</i> ,	334, 967
Robinson v. Smith and Co.,	347	Roy v. Campbell,	480
Robison v. Robison,	992	Royal Bank of Scotland v. Fairholmes,	407
Robson v. Robson,	809, 810	Royal Bank of Scotland v. Ranken,	340
Rodger v. Baird,	663	Rucker v. Fischer,	152
Rollands v. Rolland,	41	Ruddiman v. Merchant Maiden Hos-	
Rollo, Lord, v. Laird of Niddrie,	293	pital,	226
Rollo v. Shaw, <i>Exclusion of Jus Mariti</i> ,	848	Rules v. Craig's Creditors,	56
Rollo v. Shaw, <i>Fee and Liferent</i> ,	833	Russel v. Fairie,	482, 483
Rose,	771	Russel v. Paisley,	54
Rose v. Drummond,	964	Russel v. Russel (1745), <i>Personal Debts</i> ,	873
Rose v. Fraser,	796	Russel v. Russel (1769), <i>Conditio si sine liberis</i> ,	857
Rose v. Ramsay,	564	Russell v. Baird and Company,	415
Rose v. Rose (1786), <i>Liability of Heirs</i> ,	237	Russell v. Breadalbane, <i>Intimation of Assignment</i> ,	305
Rose v. Rose (1821), <i>Homologation</i> ,	181	Russell v. Breadalbane, <i>Back-Bond</i> ,	1080
Rose v. Roses,	922	Russell v. Freen,	1104
Ross v. Aglianby,	812	Russell v. Kirk,	467
Ross v. Allan's Trustees,	894, 895	Russell v. Mather,	453
Ross, Bishop of, v. Foulter,	176	Russell v. Mudie,	289, 1087
Ross v. Craigie,	262	Russell v. Ross's Creditors,	964
Ross v. Drummond,	945, 964	Russell v. Russell (1852), <i>Prohibition against Alienation</i> ,	953
Ross v. Governors of Heriot's Hospital,	1057	Rutherford v. Turnbull,	920
Ross, Lord, v. Ker,	298	Rutherford v. Nisbet's Trustees,	1029
Ross v. Masson,	813	Rutherglen v. Kennedy,	113
Ross v. Mouro,	973	Ruthven v. Weir,	151

INDEX OF CASES.

1281

	PAGE		PAGE
Ryall v. Rowles,	292	Serra v. Earl of Carnwath,	134
Rymer v. Macintyre,	345	Seth v. Hain,	1080
		Seton,	96
SALMON v. LORD BOYD,	1059	Seton v. Dawson,	895
Saltoun, Lord, v. Park,	567	Seton v. Scott,	772
Saltoun, Master of, v. Lord Saltoun,	83	Seton v. Seton,	879
Sandeman and Miller v. Thomson,	465	Seton v. Seton's Creditors,	783
Sandilands v. Earl of Haddington,	206	Setton v. Setton,	48
Sands v. Brisbane,	967	Shanks v. Aitken,	880
Saunders v. Renfrewshire Bank,	323	Shanks v. Eistons,	213
Sawers v. Tradestoun Victualling Society,	385	Shanks v. Kirk-Session of Ceres,	550
Schaw v. Calderwood,	903	Sharp,	892
Scot v. Archbishop of Glasgow,	1060	Sharp v. Christie,	850, 851
Scot v. Laing,	445	Sharp v. Harvey,	438
Scot v. Lord Drumlanrig,	300	Sharp, Fairlie, and Co. v. Garden,	503
Scot v. Rutherford,	263	Sharpe v. Berry,	372
Scot v. Stewart,	655	Sharpe v. Bickerdyke,	357
Scotland, Bank of, v. Ramsay,	615	Sharpe v. Sharpe,	961
Scotland, Bank of, v. Telfer's Creditors,	223	Sharpe v. Simpson,	332
Scott (1850), <i>Disentail</i> ,	971	Shaw v. Shaw,	223
Scott (1856), <i>Curator Bonis</i> ,	121, 931	Shedden v. Patrick,	134
Scott v. Brown,	480, 481	Shephard v. Innes,	347
Scott v. Bruce,	169	Shepherd v. Grant,	994
Scott v. Dalrymple,	57	Shepherd v. Grant's Trustees,	66, 68
Scott v. Edmund,	600	Short v. Habkin,	370
Scott v. Falconer,	1054, 1056	Sibbald v. Sibbald,	51
Scott v. Gray (1784), <i>Sexennial Prescription</i> ,	482	Sibbald v. Wallace,	146
Scott v. Gray (1862), <i>Trustees' Liability</i> ,	895	Sim,	109, 396
Scott v. Jerdon,	118	Sim v. Clark,	608
Scott v. Kilmarnock Banking Co.,	450	Sim v. Donaldson,	51
Scott v. Kyle,	147	Sim v. Yuille,	507
Scott v. Lindsay,	565	Sime's Trustee,	1113
Scott v. Napier,	783	Simpson v. Barclay,	548
Scott v. Price,	514	Simpson v. Earl of Home,	973
Scott v. Sceales,	139	Simpson v. Fleming,	256
Scott v. Scott, <i>Bill, Stamp</i> ,	197	Simson v. Graham,	772
Scott v. Scott, <i>Entail</i> ,	959	Simson v. Gray,	1102
Scott v. Steele,	208	Sinclair v. Fife,	993
Scott v. Stewart,	472	Sinclair v. Lord Duffus,	804, 827
Scott Moncrieff v. Bethune or Thomson,	331	Sinclair v. Marquis of Breadalbane,	644
Scottish Provincial Assurance Company v. Pringle,	255	Sinclair v. Murray,	83
Scottish Union Insurance Company v. Bontine,	1087	Sinclair v. Richardson,	124
Scottish Union Insurance Company v. Graham (1836), <i>Grantor's Description</i> ,	200	Sinclair v. Sinclair (1704), <i>Adjudication in Implement</i> ,	765
Scottish Union Insurance Company v. Graham (1839), <i>Sale of Life Interest</i> ,	770	Sinclair v. Sinclair (1715), <i>Homologation</i> ,	179
Seabox of Queensferry v. Stewart,	47	Sinclair v. Sinclair (1726), <i>Intimation of Assignment</i> ,	294
Selkirk, Earl of, v. Gray,	76	Sinclair v. Sinclair (1746), <i>Blanks in Writs</i> ,	226
Selkirk, Earl of, v. Nasmyth,	648	Sinclair v. Sinclairs (1749), <i>Entail, Prohibitions</i> ,	953
Sempills v. Sempill,	918	Sinclair v. Sinclair (1823), <i>Bill</i> ,	481
Semple v. Semple,	1115	Sinclair v. Sinclair (1841), <i>Entail, Interpretation</i> ,	961

	PAGE		PAGE
Sinclair v. Staples,	408	Soutar's Representatives v. Soutar,	
Sinclair v. Wilson and Maclellan,	204	<i>General Receipt,</i>	458
Skene v. Greenhill,	336, 1112	Soutar's Representatives v. Soutar,	
Skinner v. Paterson,	335	<i>Joint Obligation,</i>	480
Sligo v. Menzies,	275	Spalding v. Farquharson,	1050
Sloan v. Macmillan,	249	Speid v. Speid,	962
Smail v. Potts,	199	Speirs v. Ardrossan Canal Company,	673
Small v. Millar,	1067	Speirs v. Dunlop,	818
Smith,	348	Spence v. Alcorn's Creditors,	1049
Smith v. Aitken,	661	Spence v. Ross, <i>Delivery,</i>	100
Smith v. Bank of Scotland (1813 and		Spence v. Ross, <i>Liferent and Fee,</i>	781
1829), <i>Concealment,</i>	102	Spittal,	963
Smith v. Bank of Scotland (1816), <i>Sub-</i>		Spot, Creditors of,	58
<i>scription,</i>	34, 35	Spottiswood v. Creditors of Preston-	
Smith v. Bank of Scotland (1821), <i>Test-</i>		<i>grange,</i>	70
<i>ing Clause,</i>	51	Spottiswoode v. Seymer,	644
Smith v. Bell and Innes,	520	Sprot v. Pennycook,	912
Smith or Nimmo v. Common Agent in		Sprot's Trustees v. Sprot,	969
Ranking and Sale of Auchinblane,	854	St. Andrews, Archbishop of, v. Marquis	
Smith v. Drummond,	254	of Huntly,	700
Smith v. Frier,	173	St. Andrews, Collage of, v. Creditors of	
Smith v. Hall,	880	Newark,	1065
Smith v. Harris,	774	St. Monance, Magistrates of, v. Mackie,	561
Smith v. Lord Fife's Trustees,	354	Staintons v. Stainton's Trustees,	905
Smith v. Macgill,	571, 1104	Stalker v. Aiton,	522
Smith v. Marshall (1780), <i>Testator's</i>		Stalker v. Carmichael,	140
<i>Debts,</i>	873	Stamfield's Creditors v. Scots,	95
Smith v. Marshall (1860), <i>Rei Interventus,</i>	187	Stark v. Kincaid,	102
Smith v. M'Keand,	127	Stark v. Thom,	363
Smith v. North British Insurance Com-		Steel's Disponees v. Wemyss,	486
pany,	58	Steele v. Coupar,	968
Smith v. Officers of State,	561	Steele v. Steele (1809), <i>Submission,</i>	351, 359
Smith v. Ogilvie,	338	Steele v. Steele (1817), <i>Entail, Institute,</i>	950
Smith v. Ogle,	277, 511	Steele v. Young,	781
Smith v. Robertson,	151	Stein's Assignees v. Gibson-Craig,	181
Smith v. Ross,	207	Stein's Creditors v. Forbes, Hunter, and	
Smith v. Selby,	450	Company,	170
Smith v. Somervell,	645	Stein's Creditors v. Newnham, Everett,	
Smith v. Stewarts,	790	and Company (1783), <i>Security for</i>	
Smith v. Smith (1854), <i>Trustees' Powers,</i>	880	<i>Future Debts,</i>	1078
Smith v. Smith (1866), <i>Implement of</i>		Stein's Creditors v. Newnham, Everett,	
<i>Marriage-Contract,</i>	849	and Company, (1793), <i>Bond and Dis-</i>	
Smith and Wallace v. Smith (1710),		<i>position in Security,</i>	1068
<i>Substitution,</i>	858	Stenhouse v. Innes and Black,	1063
Smith and Others,	907	Stephenson v. Stephenson's Trustees,	478
Smith and Others v. Smith's Trustees,	522,	Sterling v. Baird's Trustees,	917
	925, 1040, 1048	Steuart v. Johnston,	420, 572, 647
Smith and Payne v. Laing, Arthur, and		Steven,	765
Company,	460	Steven and Fleming,	1073
Smiton v. Miller,	276, 277	Steven v. Lyell,	144
Smitton v. Tod,	852	Stevenson v. Allans,	114
Somerville, Lord, v. Smith,	565	Stevenson v. Barr,	788
Somerville's Factor,	111	Stevenson v. Hamilton,	128
Sommerville's Trustees v. Wameas,	895	Stevenson v. Macintyre,	918
Sorley's Trustees v. Graham,	662	Stevenson v. Stewart,	466

INDEX OF CASES.

1283

	PAGE		PAGE
Stevenson v. Viscount Duncan,	336	Stirling v. Stirling's Trustees,	977
Stewart,	1059	Stirling v. Strang,	1106
Stewart v. Baikie,	424	Stirling's Trustees v. Stirling,	940
Stewart v. Bell,	274	Stock v. Aitken,	465
Stewart v. Bird,	475	Stocks v. Miller,	468
Stewart v. Brown,	506	Stoddart v. Arklay,	39
Stewart v. Burnside,	1055	Stoddart v. Rutherford,	126
Stewart v. Campbell,	263	Stoddart v. Thomson,	866
Stewart v. Central Bank of Scotland,	330	Stonehewer v. Inglis,	452
Stewart v. Denholm,	965	Storie v. Carnie,	339
Stewart v. Duke of Montrose,	588, 644	Stormonth v. Robertson,	520
Stewart v. Dundas's Creditors,	519	Stormonth, Viscount, v. Annandale's Creditors,	935
Stewart v. Earl of Cassillis,	673	Strachan v. Forbes,	268
Stewart v. Earl of Dundonald,	868	Strachan v. M'Dougal,	309
Stewart v. Earl of Fife, <i>Registration of Sasine</i> ,	625	Strachan v. M'Dougle,	519
Stewart v. Earl of Fife, <i>Resignation and Confirmation</i> ,	691	Strachan v. Whiteford,	717
Stewart v. Falconer,	425	Strang v. M'Intosh,	169
Stewart v. Grant,	348	Strang v. Stewart,	562
Stewart v. Hay,	289	Strathallan, Viscountess, v. Lord Glenlyon's Trustees,	827
Stewart v. Horne,	1063	Strathmore, Earl of, v. Lang,	514
Stewart v. Houston,	702	Strathmore v. Strathmore's Trustees (1830), <i>Thelusson Act</i> ,	909
Stewart v. Lang's Trustees,	368	Strathmore v. Strathmore's Trustees (1837), <i>Erasures</i> ,	64
Stewart v. Lindsay,	657	Strong v. Strong,	204
Stewart v. M'Can,	267	Struthers v. Barr,	379
Stewart v. Macdonald,	87	Struthers v. Lang,	1084, 1085
Stewart v. M'Farlane,	238	Stuart v. Campbell,	341
Stewart v. Miller,	141	Stuart v. Hay,	132
Stewart v. Nicolson, <i>Birth of Nearer Heir</i> ,	1025	Stuart v. Hill,	266
Stewart v. Nicolson, <i>Entail</i> ,	943	Sturrock v. Thom's Executors,	406
Stewart v. Robertson,	484	Summers v. Marianaki,	470
Stewart v. Ross,	361	Sutherland, Duke of, v. Ross, <i>Possession</i> ,	658
Stewart v. Russell,	434	Sutherland, Duke of, v. Ross, <i>Salmon-Fishing</i> ,	568
Stewart v. Stewart (1803), <i>Dispositive Words</i> ,	548, 866	Sutherland v. Gunn,	502
Stewart v. Stewart (1813), <i>Blanks</i> ,	227	Sutherland v. Morrison,	477
Stewart v. Stewart (1815), <i>Instrument of Sasine</i> ,	614	Sutherland v. Sinclair, <i>Dispositive Clause</i> ,	550
Stewart v. Stewart (1815), <i>Provision to Heirs</i> ,	818	Sutherland v. Sinclair, <i>Heir-Male of the Body</i> ,	995
Stewart v. Stewart (1832), <i>Apprentice</i> ,	348	Sutherland v. Sutherland's Executors,	914
Stewart v. Stewart (1844), <i>Second Entail</i> ,	968	Sutherland, Countess of, v. Cuthbert,	248
Stewart v. Watherstone,	365, 366	Suttie v. Ross,	76
Stewart v. Wright and Scott,	465	Suttie v. Sutties,	997
Stirling v. Cameron,	773	Swan v. Baird,	328
Stirling v. Dalrymple,	987	Swan v. Bank of Scotland,	194, 195
Stirling v. Ewart, <i>Composition</i> ,	584	Swan's Trustees v. Muirkirk Iron Co.,	569
Stirling v. Ewart, <i>Heir's Entry</i> ,	1053	Swanson v. Robertson,	153
Stirling v. Earl of Glasgow,	58	Swany v. Bank of Scotland,	51
Stirling v. Johnston,	576	Swete v. Gordon,	770
Stirling v. Henderson,	485	Swinton v. M'Dougal,	1106
Stirling v. Honeyman,	648	Swinton's Trustee v. Forbes, Hunter, and Company,	170

	PAGE		PAGE
Sword v. Blair,	441	Thomson v. Oliphant,	1106
Sym v. Charles,	892	Thomson v. Shiel,	433
Syme v. Dickson,	950	Thomson v. Simson,	1058
Syme v. Ferguson,	465	Thomson v. Smith, <i>Discharge of Jus</i>	
Syme and Stewart v. Anderson,	523	<i>Relictæ,</i>	813
Symington v. Cranston,	206	Thomson v. Smith, <i>Taciturnity,</i>	337
Symontoun v. Brocks,	346	Thomson v. Stewart,	129
		Thomson v. Thomson and Others (1682),	
		<i>Liferent,</i>	782
TAILFER v. HAMILTON,	179	Thomson v. Thomson (1829), <i>Discharge,</i>	327
Tait v. Wilson, (1831), <i>Discharge by</i>		Thomson v. Thomson (1859), <i>Rei inter-</i>	
<i>Wife,</i>	176	<i>ventus,</i>	186
Tait v. Wilson (1831), <i>Diligence against</i>		Thomson, Still, and Company v. Gall,	442
<i>Wife,</i>	125	Thomson's Trustees v. Alexander,	89
Tait v. Wilson (1836), <i>Septennial Limi-</i>		Thomson's Trustees v. Livingstone,	115
<i>tation,</i>	264	Thorburn v. Martin,	150
Talbot v. Guydet,	324	Threipland v. Campbell,	235
Taylor v. Scott,	87, 283	Tierney v. Court,	1080
Taylor v. Adie,	271	Till v. Jamieson,	306
Taylor v. Farrie,	171	Tillicoultry, Creditors of, v. Murray,	686
Taylor v. Forbes and Company,	1043	Tinnoch v. Mackinnon,	996
Taylor v. Grieve,	363	Titill,	76
Taylor v. Neilson,	361	Tod v. Dunlop, <i>Presumption of Pay-</i>	
Taylor v. Provan,	133	<i>ment,</i>	332
Taylor v. Watson, <i>Heritable Creditors,</i>	1073	Tod v. Dunlop, <i>Security,</i>	1068
Taylor v. Watson, <i>Pactum Illicitum,</i>	150	Torphichen, Lord, v. Oswald's Heirs,	234
Taylor and Paterson v. Scouler,	340	Torrance v. Crawford,	986
Telfer and Company v. Bell,	367	Torrie v. Munsie,	922
Telford v. James, Wood, and James,	437	Tovey v. Tennent,	886
Temple v. Lady Whithingame,	75	Towart v. Sellars,	117
Tenant v. Spreul,	131	Trail v. Trail (1737), <i>Heir of Marriage,</i>	820
Tennent v. Macdonald,	352	Trail v. Trail (1805), <i>Notary,</i>	43
Thom v. Black,	496	Traquair, Earl of, v. Gibson,	46
Thomas v. Walker's Trustees,	420	Traquair, Earl of, v. Henderson,	67
Thome v. Thome,	293	Traquair, Trustees of Earl of, v. Hender-	
Thomson,	1059	<i>son's Trustees,</i>	896
Thomson v. Campbell,	892	Trotter v. Dennis,	1102
Thomson v. Cross,	125	Trotter v. Sheil,	441
Thomson v. Dove,	142	Trotter v. Trotter,	898
Thomson v. Fowler,	186	Trowsdale v. Jopp,	352
Thomson v. Fullarton, <i>Assignment,</i>	310	Tullochs v. Welsh,	922
Thomson v. Fullarton, <i>Factor's Powers,</i>	421	Turnbull,	125, 793
Thomson v. Henderson,	162	Turnbull v. Doods,	75
Thomson v. Izat,	458	Turnbull v. East-Lothian Bank,	310
Thomson v. James,	649	Turnbull v. Home,	348
Thomson v. Lawsons,	782	Turnbull v. M'Kie,	437
Thomson v. Liddell and Company,		Turnbull v. Stewart,	302
<i>Charge against Partner,</i>	501	Turnbull v. Turnbull (1778), <i>Vesting,</i>	916
Thomson v. Liddell and Company,		Turnbull v. Turnbull (1822), <i>Liferent</i>	
<i>Liability in solidum,</i>	455	<i>and Fee,</i>	783
Thomson v. Lyell,	912	Turnbulls v. Turnbull's Trustees,	852
Thomson v. M'Crummen's Trustees,	35, 60	Turner v. Turner,	973, 974
Thomson v. M'Lachlan,	895	Tweeddale v. Aytoun,	591
Thomson v. Mowat,	986	Tweeddale, Marquis of, v. Hume,	324
Thomson v. Norton,	364	Tweedie v. Beattie,	1089

INDEX OF CASES.

1285

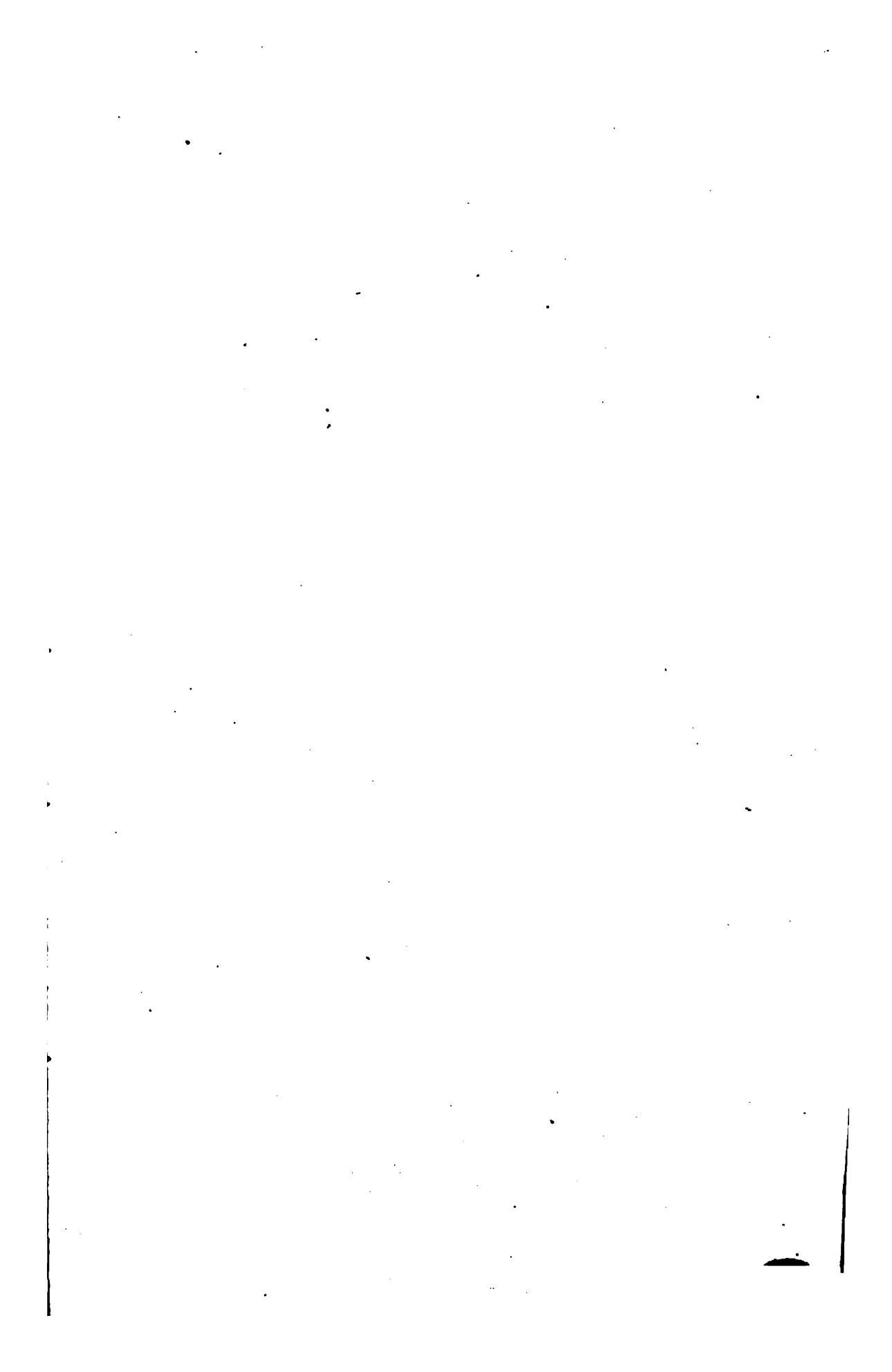
	PAGE		PAGE
UNITED KINGDOM LIFE ASSURANCE		Wallaces v. Barrie,	445
COMPANY,	309	Warburton,	260
Ure v. Anderson,	562	Wardrop v. Fairholm,	521
Urquhart v. Clunes,	737	Warner v. Cunninghame,	374
Urquhart v. Halden,	558, 670	Watherstone v. Renton,	782, 833
Urquhart v. Officers of State,	772	Watson v. Bruce,	129
		Watson v. Grindlay,	347
VALLANCE v. M'DOWALL,	60	Watson v. Johnstone,	777
Vans v. Malloch,	74	Watson v. Law,	205
Veitch,	155	Watson v. Livingstone,	464
Veitch v. Horsburgh,	42	Watson v. Macdougall,	917
Veitch v. Young,	941	Watson v. Marjoribanks,	839
Venables v. Wood,	386	Watson v. Marshall,	1049
Vere v. Dale,	112	Watson v. Munro,	300
Vere v. Earl of Hyndford,	878	Watson v. Murdoch,	ib.
		Watson v. Neuffert,	140
WADDEL v. WADDEL'S TRUSTEES,	76	Watson v. Noble's Trustees,	118, 904
Waddell,	110, 112	Watson v. Pyot,	818
Waddell v. Pollock, <i>Prescription</i> ,	656, 731	Watson v. Smith,	385
Waddell v. Pollock, <i>Seller's Title</i> ,	661	Watson v. Thomson and Company,	474
Waddell v. Waddell (1739), <i>Minor's</i>		Watt and Anderson v. Shaw,	679
<i>Testament</i> ,	114	Watt v. Jarvie,	914
Waddell v. Waddell (1836), <i>Alimentary</i>		Watt's Trustees v. Pinkney,	440
<i>Right</i> ,	314	Watters,	434
Waddell's Trustees v. Scotta,	458	Wauchope v. Duke of Roxburgh,	725
Walker v. Adamson's Representatives,	49	Wauchope v. Gibson,	853
Walker v. Flint,	187	Wauchope v. Niddrie,	77
Walker v. Gavin,	676	Weatherly v. Turnbull,	310
Walker v. Home,	123	Weavers of Calton v. Weavers of Glas-	
Walker v. Hunter,	1094	gow,	140
Walker and Others (M'Gillivray's Exe-		Webster v. Christie,	163
cutors) v. Masson and Others,	237, 337	Webster v. Donaldson, <i>Assignment of</i>	
Walker v. Perkins,	137	<i>Rents</i> ,	598
Walker v. Somerville,	423	Webster v. Donaldson, <i>Heritable Credi-</i>	
Walker's Representatives v. Governors		<i>tor</i> ,	1075
of Heriot's Hospital,	729	Wedderburn, Laird of, v. Wardlaw,	585
Walkers v. Steele,	905	Weir v. Falconer,	517
Walkinshaw v. Gray,	424	Weir v. Parkhill,	487
Wallace,	796	Weirs v. Ralstons,	46
Wallace v. Campbell,	263	Wellwood v. Wellwood,	804
Wallace v. Dalrymple,	603	Wellwood's Trustees v. Boswell (1851),	
Wallace v. Davies,	303	<i>Unlawful Conditions</i> ,	138
Wallace v. Donald,	338	Wellwood's Trustees v. Boswell (1856),	
Wallace v. Edgar,	292, 293	<i>Factor's Liability</i> ,	246
Wallace v. Earl of Eglinton,	1056	Wellwood's Trustees v. Boswell (1856),	
Wallace v. Ferguson,	591	<i>Trustee, Remuneration</i> ,	425
Wallace v. Muir,	78, 916	Welsh v. Barstow,	335, 967
Wallace v. Plock,	501	Welsh v. Cairnie,	868
Wallace v. Wallace,	363	Wemyss, Earl of, v. Earl of Hadding-	
Wallace v. Wallaces,	917, 922	ton,	819
Wallace, Hamilton, and Company v.		Wemyss, Earl of, v. Montgomery,	151
Campbell, <i>Bill, Assignment</i> ,	454	Wemyss, Earl of, v. Murray,	973
Wallace, Hamilton, and Company v.		Wemyss, Earl of, v. Trail,	854
Campbell, <i>Partnership</i> ,	379	Wemyss v. Hay,	53, 55, 60, 61

	PAGE		PAGE
Wemysses v. Wemyss, <i>Homologation</i> ,	179	Wilsone's Trustees v. Stirling, <i>Testa-</i>	
Wemysses v. Wemyss, <i>Marriage-Con-</i>		<i>ment</i> ,	904
<i>tract</i> ,	850	Wingate v. Martin,	340
Westraw v. Williamson,	301	Wintrup,	130
Wharncliffe, Lord, v. Nairne,	960	Wishart v. Falconer,	361
White v. Alexander,	842	Wishart v. Wishart,	268
White v. Fergus,	367	Wixon v. Nicoll and Company, <i>Agent</i> ,	
White v. Henderson,	57	<i>Payee</i> ,	442
White v. Knox,	41	Wixon v. Nicoll and Co., <i>Agent</i> , <i>In-</i>	
White v. Spottiswoode,	516	<i>dorser</i> ,	452
Whitehead v. Henderson,	477	Woddrop v. Finlay,	371
Whyte v. Neish,	301	Wood v. Aitchison,	840, 857
Wick, Magistrates of, v. Forbes,	1045	Wood v. Burnet's Trustees,	919
Wight v. Brown,	798	Wood v. Fairley,	840
Wight's Trustees v. Allan,	519	Wood v. Gordon,	326
Wightman v. Graham,	177	Wood v. Howden,	482
Wightman v. Wilson,	800	Wood v. Ker, <i>After-stamping</i> ,	199
Wilkie v. Dunlop and Company,	115	Wood v. Ker, <i>Clerical Error</i> ,	66
Wilkie v. Flowerdew, <i>Adjudication</i> ,	765	Wood v. Northern Reversion Company,	
Wilkie v. Flowerdew, <i>Stamp-Duty</i> ,	192	<i>Payment, Presumption</i> ,	333
Wilkie v. Wilkie,	921	Wood v. Northern Reversion Company,	
Wilkinson v. Monies,	88	<i>Trust-Purposes</i> ,	746
Wilks v. Callender,	177	Wood v. Reid,	168
Williams' Trustee v. Inglis, Borthwick		Wood v. Scott,	772
Gilchrist, and Company,	373	Wood (Wordsworth's Factor),	111
Williamson v. Cochran,	923	Wood's Trustees v. Ferrier,	616
Williamson v. Ewart,	986, 987	Woodhead v. Nairn,	176
Williamson v. Fraser,	1044	Woodmass v. Hialop's Trustees,	1015
Williamson v. Sharp, <i>Entail, Registra-</i>		Woodside v. Cuthbertson,	351
<i>tion</i> ,	964	Wordsworth v. Pettigrew,	147
Williamson v. Sharp, <i>Fraud</i> ,	166	Wright v. Anderson,	524
Williamson v. Urquhart,	40	Wright v. Cunningham,	520
Williamson v. Williamson,	34	Wright v. Murray, <i>Adjudication in Im-</i>	
Willison v. Dorator's Creditors,	964	<i>plement</i> ,	766
Willoch v. Ochterlony,	903	Wright v. Murray, <i>Stamp</i> ,	199
Wilson,	130	Wright v. Wright,	150
Wilson v. Burrell,	1089	Wright's Trustees v. Hamilton,	150
Wilson v. Fraser,	1076	Wrights v. Lumsden,	348
Wilson v. Glen,	781	Wrights v. Wrights,	487
Wilson v. Haddo,	363	Wylie v. Allan,	1063
Wilson v. Hume,	1026	Wyllie v. Fiddes,	235
Wilson v. Laing,	563	Wyper v. Harveys,	515
Wilson v. M'Knight,	485		
Wilson v. Pollock,	731	YEATS v. YEATS' TRUSTEES,	75
Wilson v. Pringles,	37, 850	York Buildings Company, Creditors of,	84
Wilson v. Raeburn,	37	York Buildings Company v. Grant,	1105
Wilson v. Reid,	1020	York Buildings Co. v. Mackenzie,	150, 772
Wilson v. Robinson,	433	York Buildings Company v. Martin,	167
Wilson v. Smart,	924	Yorkstoun v. Grieve,	41
Wilson v. Wilson,	919	Young,	201
Wilson v. Wilson's Creditors,	998	Young v. Bruce,	590
Wilson and M'Lellan v. Fleming,	524	Young v. Carmichael,	560
Wilson and M'Lellan v. Sinclair,	156	Young v. Dunn,	651, 673
Wilsone's Trustees v. Stirling, <i>Privileged</i>		Young v. Forbes,	463
<i>Writing</i> ,	80	Young v. Grierson,	667

INDEX OF CASES.

1287

	PAGE		PAGE
Young v. Leith,	625, 1051	Yuille v. Scott,	265
Young v. London,	410	Yule v. Yule,	915
Young v. Procurators of Leith,	140		
Young v. Sinclair,	242	ZETLAND, EARL OF, v. CARRON COMPANY,	592
Young v. Watson, <i>Heirs of Marriage</i> ,	823	Zuille v. Morrison, <i>Consolidation</i> ,	731
Young v. Watson, <i>Power of Disposal</i> ,	778	Zuille v. Morrison, <i>Marriage Settle-</i>	
Young's Trustees v. Ross and Others,	80	<i>ment</i> ,	823



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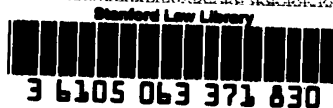
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